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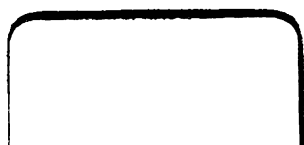
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A DIGEST
OF
THE LAW OF ENGLAND
WITH REFERENCE TO
THE CONFLICT OF LAWS.

BY
A. V. DICEY, Q.C., B.C.L.
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WITH NOTES OF AMERICAN CASES,
BY
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To
ARTHUR COHEN
ONE OF HER MAJESTY'S COUNSEL
WHOSE MASTERY OF LEGAL PRINCIPLES
IS SURPASSED ONLY BY
THE KINDNESS WITH WHICH HIS LEARNING AND EXPERIENCE
ARE PLACED AT THE SERVICE OF
HIS FRIENDS

PREFACE.

MY aim in this book is to apply to the whole field of private international law the method of treatment already applied to a large part thereof in my book on the law of domicile. In the following pages the principles of private international law recognised by English Courts—or, to use an exactly equivalent expression, the principles adhered to by English judges when dealing with the conflict of laws—are treated as a branch of the law of England: these principles are exhibited in the form of systematically arranged Rules and Exceptions, and each of these Rules and Exceptions is, when necessary, elucidated by comment and illustrations. Hence this treatise has a twofold character. It is, or rather it contains, a second and carefully corrected edition of *The Law of Domicil as a Branch of the Law of England*. It is also a complete digest of and commentary on the law of England with reference to the conflict of laws.

There are two features of this work to which it may be allowable to call particular attention:—

First. Pains have been taken to render this treatise useful to American no less than to English readers.

For the promotion of this object Professor J. B. Moore, of Columbia College, New York, has appended to each of the leading chapters of this Digest a statement of American law on the subject therein dealt with, and has given the authorities, and especially the most recent American decisions, which support the conclusions at which he has arrived. To him belongs the whole credit, as also of course the whole responsibility, for this account of American law. His name is a sufficient guarantee for its accuracy. This review of American cases will be, it is hoped, whilst of practical utility to American, of considerable interest to English lawyers.

Secondly. The Note on the *Limits of Taxation*, which fills nearly a third of the Appendix to the Digest, treats of a new and important topic.

This Note, which constitutes in fact a short essay, contains an attempt to define, in regard to the Death Duties and the Duties of Income Tax, the general principles followed by English Courts in determining who are the persons to whom and what are the things to which a Taxing Act passed by the Imperial Parliament applies. This topic is one which is generally referred to in a fragmentary and cursory manner by writers on the conflict of laws. It does not in strictness belong to, though it is closely connected with, the subject on which such writers are engaged. It requires, if touched upon at all, to be dealt with systematically as a separate branch of law. Whatever may be the value of the doctrines which I have endeavoured to establish with reference to the limits or area of taxation, the subject is admittedly of importance, and has not, as far as my knowledge goes, received systematic treatment at the hands of any English author.

That the attempt to form a digest of private international law, as administered by the English Courts, should result in anything like complete success, is more than I can hope. This branch of law has been created within little more than a century by a series of judicial decisions, and is now, to the great benefit of the public, year by year extended and developed through the legislative activity of our judges. This development has not yet reached its term. No one therefore can finally sum up its results. That even the endeavour to form a digest of private international law should be possible, is due to the labours of my predecessors. This field of law has been fully explored by Story, Westlake, Foote, Wharton, and Nelson. The works of these authors have, during the composition of this treatise, never been long out of my hands. I have also sought the guidance, when I could obtain it, of English writers who have dealt either directly or indirectly with special departments of private international law; thus on the difficult subject of foreign judgments I have been greatly aided by Mr. Piggott's ingenious and exhaustive monograph: nor have I neglected to consult foreign jurists, such as Savigny, Bar, and Fœlix, who, even when they disagree with the conclusions

arrived at by English judges, often throw considerable light, if it be only by way of contrast, on the doctrines maintained in England with regard to the conflict of laws. To no single English writer, let me add, am I more deeply indebted than to Mr. Westlake. The soundness and thoroughness of his workmanship can be appreciated only by readers who, like myself, have made an elaborate study of his *Treatise on Private International Law*. There will be found, indeed, in the following pages, several expressions of dissent from his conclusions. Such criticism, however, so far from being the result of any underestimate of, is in reality a tribute to, his merits. Whenever it was my misfortune to disagree on any material matter with an opinion of Mr. Westlake, it was due to my readers to state that my own view lacked the support to be derived from his concurrence, and due to myself to explain, and if possible to justify, my dissent from conclusions which carry the weight of his authority.

It is a pleasure, no less than a duty, to return my heartfelt thanks to the many friends who have aided me in the production of this book.

From my friend Mr. Arthur Cohen I have received help which is in the strictest sense invaluable. His advice has often removed difficulties with which I should not myself have been able to cope, and any novelty which may be found in the book is due in great measure to his ingenious and fertile suggestions. To my friend and colleague Professor Holland, also, I am under intellectual obligations of a special character. My whole conception of private international law has been influenced by views expressed by him, not only in his writings but in his conversation. There is more than one fundamental idea embodied in this work of which, owing to our constant intercommunication of thought, I should find it hard to say whether it originated in my own mind or was suggested to me by my friend. My special thanks are also due to Mr. John M. Gover, who has added to this treatise a carefully prepared index, and to the many officials and others who have given me information on matters of detail where my own knowledge was at fault. On questions connected with grants of probate, or letters of administration, I have enjoyed the great advantage of consulting Mr. Musgrave, of the Probate Registry,

whilst my friend Mr. Highmore, of the Inland Revenue Office, and Mr. Norman, the author of the admirable *Digest of the Death Duties*, have spared no pains to explain to me details with regard to the incidence of the Death Duties and the Duties of Income Tax. But for every statement in this work, with the exception of course of the summaries of American law supplied by Mr. Moore, I alone am responsible. Whatever errors it contains are wholly my own. Whatever merits it may exhibit are due in no small degree to the authors whose works I have studied, and whose conclusions I have reproduced, and to the many friends from whom I have received help and encouragement.

A. V. DICEY.

1896.

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- ARNOULD — Marine Insurance, 3rd ed., by D. MacLachlan.
AUSTIN — Lectures on Jurisprudence, 4th ed., 1873.
BAR — Das Internationale Privat- und Strafrecht.
—— Private International Law, translated by G. R. Gillespie, 2nd ed., 1892.
BELL — Commentaries on the Law of Scotland, 7th ed., J. McLaren.
—— Principles of Law of Scotland, 9th ed.
—— Dictionary of the Law of Scotland, 1882 ed.
BISHOP — Commentaries on the Law of Marriage and Divorce, 5th ed.
—— Commentaries on the Law of Married Women, Boston, 1873.
BLACKSTONE — Commentaries on the Laws of England.
BROWNE — Principles and Practice of the Court for Divorce and Matrimonial Causes, 3rd ed.
—— Probate Practice, 2nd ed.
BULLEN & LEAKE — Precedents of Pleadings, 3rd ed.
CARVER — Carriage by Sea (1885).
CHALMERS — Digest of Law of Bills of Exchange, 4th ed.
CLODE — Petition of Right (1887).
COCKBURN — Nationality.
CODE CIVIL.
CODICE CIVILE DEL REGNO D' ITALIA.
COKE — Institutes.
—— upon Littleton.
COOLEY — Constitutional Limitations, 6th ed.
CRUISE — The Origin and Nature of Dignities, 2nd ed.
DICEY — Parties to an Action.
DOWELL — Income Tax Laws, 4th ed.
DUER — The Law and Practice of Marine Insurance (1845).
FIORE — Droit International Privé, par P. Pradier-Fodéré, Paris, 1875.
FOOTE — Private International Jurisprudence, 2nd ed.
FRASER — Treatise on Husband and Wife, according to the Law of Scotland, 2nd ed., 1876.
FREEMAN — Law of Judgments, 3rd ed.
FREETH — New Death Duty.
GOUDY — Law of Bankruptcy in Scotland, 2nd ed., 1895.
HALL — International Law, 4th ed.
HANSON — The Acts relating to Probate, Legacy, and Succession Duties, 3rd ed.
HOLLAND — Jurisprudence, 7th ed.
JACOBS — Law of Domicil, Boston, 1887.

- KENT — Commentaries on American Law, 12th ed.
 LEAKE — Law of Contracts, 3rd ed.
 LEWIN — The Law of Trusts, 8th ed.
 LINDLEY — Company Law, 5th ed.
 LOWNDES — Law of Marine Insurance (1881).
 MACKAY — Practice of Court of Session (1877).
 ——— Manual of Practice in the Court of Session (1893).
 MACLACHLAN — Treatise on the Law of Merchant Shipping, 4th ed.
 McLAREN — Law of Wills and Succession.
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 NELSON — Private International Law (1889).
 NORMAN — Digest of Death Duties (1892).
 PATERSON — Compendium of English and Scotch Law, 2nd ed.
 PHILLIMORE — Commentaries upon International Law, vol. iv., 3rd ed.
 PIGGOTT — Foreign Judgments, 2nd ed.
 POLLOCK — Principles of Contract, 6th ed.
 REPORT OF ROYAL COMMISSION ON THE LAWS OF MARRIAGE (1868).
 ROSCOE — Admiralty Law (1882).
 SAVIGNY — A Treatise on the Conflict of Laws, and the Limits of their Operation in respect of Place and Time, 2nd ed., 1880.¹
 SMITH — Leading Cases, 9th ed.
 SPENCE — Jurisdiction of the Courts of Chancery (1846).
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 ——— Equity Jurisprudence, 12th ed.
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 TRISTRAM & COOTE — Probate Practice, 11th ed.
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¹ The references are to W. Guthrie's translation of Savigny's treatise, which forms the eighth volume of his *System des Heutigen Romischen Rechts*. The sections referred to are those of the original work. The pages are the pages of the translation.

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ADDENDA.

PAGE 248, note 4.

Mayer v. Claretie, 1890, 7 Times L. R. 40, gives an example of a contract to be performed in England the breach of which takes place out of England.

PAGE 274, note 4.

Hurley v. Hurley, 1892, 67 L. T. 384, follows *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1.

PAGE 355.

Rio Tinto Copper Co. v. Société des Métaux, 1890, 6 Times L. R. 408. An action will not be stayed on the ground that it is brought in respect of a matter which has already been decided by a foreign Court of competent jurisdiction, unless the English action is between the same parties, and is brought with the same objects as the action in which the foreign Court has given judgment.

PAGE 376.

Boissière v. Brockner, 1889, 6 Times L. R. 85, illustrates the meaning of a "voluntary" appearance.

PAGE 392, note 1.

Ingham v. Sachs, 1886, 56 L. T. 920, according to which a Prussian Court has jurisdiction to dissolve the marriage of persons (not being British subjects) domiciled in Austria but resident in Prussia, follows *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1, and is, it is submitted, wrongly decided.

PAGE 424, note 1.

In re Low, [1894] 1 Ch. (C. A.) 147. When a Scotch judgment is registered in England, the judgment creditor stands in the same position as that in which he would have stood if he had on the day of registration recovered judgment in an English Court.

PAGE 519, note 4.

Welch v. Tennent, [1891] A. C. 639.

PAGE 520, note 2.

But see *In re Harman*, [1894] 3 Ch. 607.

PAGE 651, note 3.

See, however, *In re Marsland*, 1886, 55 L. J. Ch. 581, 582, judgment of *Kay*, J., which seems to imply that rights to property actually acquired by a husband under the law of his matrimonial domicile may be lost by a change of domicile.

PAGE 663, note 5.

Submarine Telegraph Co. v. Dickson, 1864, 15 C. B. N. S. 759; 33 L. J. C. P. 139.

PAGE 686, note 2.

In re Elliott, 1891, W. N. p. 9, to be added after *Mayor &c. of Canterbury v. Wyburn*, [1895] A. C. 89.

PAGE 702, note 4.

Milnes v. Foden, 1890, 59 L. J. P. D. 62.

PAGE 805, note 5.

See, however, *Grainger v. Gough*, 1896, 12 Times L. R. (H. L.) 364, reversing the judgment of the Court of Appeal. The judgment of the House of Lords establishes that a wine merchant who is resident and manages his business outside the United Kingdom does not, by the mere fact of obtaining, through an agent or otherwise, orders for goods from purchasers in the United Kingdom, exercise a trade within the United Kingdom. This case possibly overrules *Pommery v. Apthorpe*, 1886, 56 L. J. Q. B. D. 155, and *Werle v. Colquhoun*, 1888, 20 Q. B. D. (C. A.) 753, but does not invalidate the principle that a person resident and managing his business outside the United Kingdom is liable to income tax on profits accruing to him from contracts made or performed in the United Kingdom.

TABLE OF PRINCIPLES AND RULES.

INTRODUCTION.

GENERAL PRINCIPLES.

Jurisdiction and Choice of Law.

GENERAL PRINCIPLE No. I. — Any right which has been duly acquired under the law of any civilised country is recognised and, in general, enforced by English Courts, and no right which has not been duly acquired is enforced or, in general, recognised by English Courts.

GENERAL PRINCIPLE No. II. — English Courts will not enforce a right otherwise duly acquired under the law of a foreign country :

(A) Where the enforcement of such right is inconsistent with any statute of the Imperial Parliament intended to have extra-territorial operation ;

(B) Where the enforcement of such right is inconsistent with the policy of English law, or with the maintenance of English political institutions ;

(C) Where the enforcement of such right involves interference with the authority of a foreign sovereign within the country whereof he is sovereign.

Jurisdiction.

GENERAL PRINCIPLE No. III. — The sovereign of a country, acting through the Courts thereof, has jurisdiction over (*i. e.*, has a right to adjudicate upon) any matter with regard to which he can give an effective judgment, and has no jurisdiction over (*i. e.*, has no right to adjudicate upon) any matter with regard to which he cannot give an effective judgment.

SUB-RULE. — When with regard to any matter (*e. g.*, divorce) the Courts of no one country can give a completely effective judgment, but the Courts of several countries can give a more or less effective judgment, the Courts of that country where the most effective judgment can be given have a preferential jurisdiction.

GENERAL PRINCIPLE No. IV. — The sovereign of a country, acting through the Courts thereof, has a right to exercise jurisdiction over any person who voluntarily submits to his jurisdiction, or, in other words, the Courts of a country are Courts of competent jurisdiction over any person who voluntarily submits to their jurisdiction.

Choice of Law.

GENERAL PRINCIPLE No. V. — The nature of a right acquired under the law of any civilised country must be determined in accordance with the law under which the right is acquired.

GENERAL PRINCIPLE No. VI. — Whenever the legal effect of any transaction depends upon the intention of the party or parties thereto, as to the law by which it was governed, then the effect of the transaction must be determined in accordance with the law contemplated by such party or parties.

BOOK I.

PRELIMINARY MATTERS.

CHAPTER I.

INTERPRETATION OF TERMS.

I. DEFINITIONS.

IN the following Rules and Exceptions, unless the context or subject-matter otherwise requires, the following terms have the following meanings.

1. "This Digest" means the Rules and Exceptions contained in Books I. to III. of this treatise.

2. "Court" means Her Majesty's High Court of Justice in England.

3. "Person" includes a corporation or body corporate.

4. "Country" means the whole of a territory subject under one sovereign to one system of law.

5. "State" means the whole of the territory (the limits whereof may or may not coincide with those of a country) subject to one sovereign.

6. "Foreign" means not English.

7. "Foreign country" means any country which is not England.

8. "England" includes any ship of the Royal Navy wherever situate.

9. "United Kingdom" means the United Kingdom of England, Scotland, and Ireland, and the islands adjacent thereto; but does not include either the Isle of Man or the Channel Islands.

10. "British dominions" means all countries subject to the Crown, including the United Kingdom.

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10. "British dominions" means all countries subject to the Crown, including the United Kingdom.

11. "Domicil" means the country which in accordance with the Rules in this Digest is considered by law to be a person's permanent home.

12. "Independent person" means a person who as regards his domicil is not legally dependent, or liable to be legally dependent, upon the will of another person.

13. "Dependent person" means any person who is not an independent person as hereinbefore defined, and includes :

(i) a minor.

(ii) a married woman.

14. "An immovable" means a thing which can be touched but which cannot be moved, and includes, unless the contrary is expressly stated, a chattel real.

15. "A movable" means a thing which is not an immovable, and includes :

(i) a thing which can be touched and can be moved, and

(ii) a thing which is the object of a claim, and cannot be touched, or, in other words, a *chose in action*.

16. "*Lex domicilii*," or "law of the domicil," means the law of the country where a person is domiciled.

17. "*Lex loci contractus*" means the law of the country where a contract is made.

18. "*Lex loci solutionis*" means the law of the country where a contract is to be performed.

19. "*Lex situs*" means the law of the country where a thing is situate.

20. "*Lex fori*" means the local or territorial law of the country to which a Court, wherein an action is brought, or other legal proceeding is taken, belongs.

II. APPLICATION OF TERM "LAW OF COUNTRY."

In this Digest the law of a given country (*e. g.*, the law of the country where a person is domiciled) :

(i) means, when applied to England, the local or territorial law of England ;

(ii) means, when applied to any foreign country, any law, whether it be the local or territorial law of

that country or not, which the Courts of that country apply to the decision of the case to which the Rule refers.

CHAPTER II.

DOMICIL.

(A) DOMICIL OF NATURAL PERSONS.

I. NATURE OF DOMICIL.

RULE 1. — The domicile of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law.

RULE 2. — No person can at any time be without a domicile.

RULE 3. — Subject to the exception hereinafter mentioned, no person can have at the same time more than one domicile (?).

Exception. — A person within the operation of the Domicile Act, 1861, 24 & 25 Vict. cap. 121, may possibly have one domicile for the purpose of testate or intestate succession, and another domicile for all other purposes.

RULE 4. — A domicile once acquired is retained until it is changed

- (1) in the case of an independent person, by his own act;
- (2) in the case of a dependent person, by the act of some one on whom he is dependent.

II. ACQUISITION AND CHANGE OF DOMICIL.

Domicil of Independent Persons.

RULE 5. — Every independent person has at any given moment either

- (1) the domicile received by him at his birth (which

domicil is hereinafter called the domicil of origin), or,

- (2) a domicil (not being the same as his domicil of origin) acquired or retained by him while independent by his own act (which domicil is hereinafter called a domicil of choice).

Domicil of Origin.

RULE 6. — Every person receives at (or as from) birth a domicil of origin.

- (1) In the case of a legitimate child born during his father's lifetime, the domicil of origin of the child is the domicil of the father at the time of the child's birth.
- (2) In the case of an illegitimate or posthumous child, the domicil of origin is the domicil of his mother at the time of his birth.
- (3) In the case of a foundling, the domicil of origin is the country where he is born or found.
- (4) In the case of a legitimated person, the domicil of origin is (probably) the domicil which his father had at the time of such person's birth (?).

Domicil of Choice.

RULE 7. — Every independent person can acquire a domicil of choice, by the combination of residence (*factum*), and intention of permanent or indefinite residence (*animus manendi*), but not otherwise.

Change of Domicil.

RULE 8.

- (1) The domicil of origin is retained until a domicil of choice is in fact acquired.
- (2) A domicil of choice is retained until it is abandoned, whereupon either
 - (i) a new domicil of choice is acquired ; or
 - (ii) the domicil of origin is resumed.

Domicil of Dependent Persons (Minors and Married Women).

RULE 9.—The domicil of every dependent person is the same as, and changes (if at all) with, the domicil of the person on whom he is, as regards his domicil, legally dependent.

SUB-RULE 1.—Subject to the exceptions hereinafter mentioned, the domicil of a minor is during minority determined as follows :

- (1) The domicil of a legitimate or legitimated minor is, during the lifetime of his father, the same as, and changes with, the domicil of his father.
- (2) The domicil of an illegitimate minor, or of a minor whose father is dead, is, whilst the minor lives with his mother, the same as, and changes with, the domicil of the mother (?).
- (3) The domicil of a minor without living parents, or of an illegitimate minor without a living mother, possibly is the same as, and changes with, the domicil of his guardian, or may be changed by his guardian (?).

Exception 1 to Sub-Rule.—The domicil of a minor is not changed by the mere re-marriage of his mother.

Exception 2 to Sub-Rule.—The change of a minor's home by a mother or a guardian does not, if made with a fraudulent purpose, change the minor's domicil.

SUB-RULE 2.—The domicil of a married woman is during coverture the same as, and changes with, the domicil of her husband.

RULE 10.—A domicil cannot be acquired by a dependent person through his own act.

SUB-RULE.—Where there is no person capable of changing a minor's domicil, he retains, until the termination of his minority, the last domicil which he has received.

RULE 11.—The last domicil which a person receives

whilst he is a dependent person continues, on his becoming an independent person, unchanged until it is changed by his own act.

SUB-RULE 1. — A person on attaining his majority retains the last domicile which he had during his minority until he changes it.

SUB-RULE 2. — A widow retains her late husband's last domicile until she changes it.

SUB-RULE 3. — A divorced woman retains the domicile which she had immediately before, or at the moment of divorce, until she changes it.

III. ASCERTAINMENT OF DOMICIL.

Domicil — How Ascertained.

RULE 12. — The domicile of a person can always be ascertained by means of either

- (1) a legal presumption; or
- (2) the known facts of the case.

Legal Presumptions.

RULE 13. — A person's presence in a country is presumptive evidence of domicile.

RULE 14. — When a person is known to have had a domicile in a given country he is presumed, in absence of proof of a change, to retain such domicile.

Facts which are Evidence of Domicil.

RULE 15. — Any circumstance may be evidence of domicile, which is evidence either of a person's residence (*factum*), or of his intention to reside permanently (*animus*), within a particular country.

RULE 16. — Expressions of intention to reside permanently in a country are evidence of such an intention, and in so far evidence of domicile.

RULE 17. — Residence in a country is *primâ facie* evi-

dence of the intention to reside there permanently (*animus manendi*), and in so far evidence of domicile.

RULE 18. — Residence in a country is not even *prima facie* evidence of domicile, when the nature of the residence either is inconsistent with, or rebuts the presumption of, an intention to reside there permanently (*animus manendi*).

(B) DOMICIL OF LEGAL PERSONS OR CORPORATIONS.

RULE 19. — The domicile of a corporation is the place considered by law to be the centre of its affairs, which

- (1) in the case of a trading corporation, is its principal place of business, *i. e.*, the place where the administrative business of the corporation is carried on,
- (2) in the case of any other corporation, is the place where its functions are discharged.

CHAPTER III.

BRITISH NATIONALITY.

RULE 20.

- (1) "British subject" means any person who owes permanent allegiance to the Crown.
- (2) "Natural-born British subject" means a British subject who has become a British subject at the moment of his birth.
- (3) "Naturalized British subject" means any British subject who is not a natural-born British subject.
- (4) "Alien" means any person who is not a British subject.
- (5) "Statutory alien" means any person who, having been a natural-born British subject, has become an alien in accordance with any of the following Rules.

The term includes a widow who, having been

a natural-born British subject, has, in accordance with Rules 31 and 32, become an alien by or in consequence of her marriage with an alien.

- (6) "Disability" means the status of being an infant, lunatic, idiot, or married woman.
- (7) "Declaration of alienage" means a declaration of a person's desire to be an alien, made in the manner and form provided by the Naturalization Act, 1870.

RULE 21. — Every natural person is either a British subject or an alien.

(A) ACQUISITION OF BRITISH NATIONALITY AT BIRTH
(NATURAL-BORN BRITISH SUBJECTS).

RULE 22. — Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions is a natural-born British subject.

Exception 1. — Any person who (his father being an alien enemy) is born in a part of the British dominions which, at the time of such person's birth, is in hostile occupation, is an alien.

Exception 2. — Any person whose father (being an alien) is at the time of such person's birth an ambassador or other diplomatic agent accredited to the Crown by the sovereign of a foreign state, is (though born within the British dominions) an alien.

RULE 23. — Subject to the exception hereinafter mentioned, any person

- (1) whose father is born within the British dominions, or
- (2) whose paternal grandfather is born within the British dominions

is (though not born within the British dominions) a natural-born British subject.

Provided that no person is under this Rule a natural-born British subject whose father is not at the time of such person's birth a natural-born British subject.

Exception. — Any person born out of the British dominions, whose father, though a natural-born British subject, is at the time of such person's birth in the actual service of any foreign prince or state in enmity with the Crown, is not a natural-born British subject.

RULE 24. — Any person whose father (being a British subject) is, at the time of such person's birth, an ambassador or other public minister in the service of the Crown, is (though born out of the British dominions) a natural-born British subject.

SUB-RULE. — British nationality is not inherited through women.

(B) ACQUISITION, LOSS, AND RESUMPTION OF BRITISH NATIONALITY AT PERIOD OF LIFE LATER THAN BIRTH.

I. ACQUISITION, LOSS, ETC., BY PERSON NOT BEING UNDER ANY DISABILITY.

(i) Acquisition.

RULE 25. — An alien [not being under any disability?] who, within such limited time before making the application hereinafter mentioned as may be allowed by one of Her Majesty's Principal Secretaries of State [hereinafter referred to as the Secretary of State], either by general order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the service of the Crown for a term of not less than five years, and intends, when naturalized, either to reside in the United Kingdom, or to serve under the Crown, may apply to the Secretary of State for a certificate of naturalization.

The applicant must adduce in support of his application such evidence of his residence or service, and intention to reside or serve, as such Secretary of State may require. The Secretary of State, if satisfied with the evidence adduced, must take the case of the applicant into consideration, and may, with or without assigning any reason, give or withhold a certificate as he thinks most conducive to the public good; and no appeal lies from his decision, but such

certificate does not take effect until the applicant has taken the oath of allegiance.

An alien to whom a certificate of naturalization is granted is, in the United Kingdom, entitled to all political and other rights, powers, and privileges, and is subject to all obligations, to which a natural-born British subject is entitled, or subject in the United Kingdom, with this qualification, that he is not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, to be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

(ii) *Renunciation.*

RULE 26.— Any British subject who has at any time before, or may at any time after, the 12th day of May, 1870, when in any foreign state and not under any disability, voluntarily become naturalized in such state, is, from and after the time of his so having become naturalized in such foreign state, to be deemed to have ceased to be a British subject and to be regarded as an alien.

RULE 27.— Where the Crown has entered into a convention with any foreign state to the effect that the subjects or citizens of that state who have been naturalized as British subjects may divest themselves of their status as such subjects, it may be declared, by Order in Council, that such convention has been entered into by the Crown; and from and after the date of such Order in Council, any person [not being under any disability (?) and] being originally a subject or citizen of the state referred to in such Order, who has been naturalized as a British subject, may, within such limit of time as may be provided in the convention, make a declaration of alienage, and from and after the date of his so making such declaration such person is to be regarded as an alien, and as a subject of the state to which he originally belonged as aforesaid.

RULE 28.— Any person who by reason of his having been

born within the British dominions is a natural-born subject, but who also at the time of his birth became under the law of any foreign state a subject of such state, and is still such subject, may, if not under any disability, make a declaration of alienage, and from and after the making of such declaration of alienage such person ceases to be a British subject, *i. e.*, becomes an alien.

RULE 29. — Any person who is born out of the British dominions, of a father being a British subject, may, if not under any disability, make a declaration of alienage, and from and after the making of such declaration ceases to be a British subject, *i. e.*, becomes an alien.

(iii) *Resumption.*

RULE 30. — Any statutory alien [not being under any disability?] may, on performing the same conditions and adducing the same evidence as is required under Rule 25 in the case of an alien applying for a certificate of naturalization, apply to the Secretary of State for a certificate (hereinafter referred to as a certificate of re-admission to British nationality) re-admitting him to the status of a British subject. The Secretary of State has the same discretion as to the giving or withholding of the certificate as in the case of a certificate of naturalization, and an oath of allegiance is in like manner required previously to the issuing of the certificate.

A statutory alien to whom a certificate of re-admission to British nationality has been granted from the date of the certificate of re-admission, but not in respect of any previous transaction, resumes his position as a British subject; with this qualification, that, within the limits of the foreign state of which he became a subject, he is not to be deemed to be a British subject unless he has ceased to be a subject of that foreign state according to the laws thereof, or in pursuance of a treaty to that effect.

The jurisdiction exercisable under this Rule by the Secretary of State in the United Kingdom in respect of the

- (1) any foreign sovereign ;
- (2) any ambassador or other diplomatic agent representing a foreign sovereign and accredited to the Crown ;
- (3) any person belonging to the suite of such ambassador or diplomatic agent.

An action or proceeding against the property of any of the persons enumerated in this Rule is, for the purpose of this Rule, an action or proceeding against such person.

Exception 1. — The Court has jurisdiction to entertain an action against a foreign sovereign, or (seem) an ambassador, diplomatic agent, or other person coming within the terms of Rule 38 (2) and (3), if such foreign sovereign, ambassador, or other person, having appeared before the Court voluntarily, waives his privilege and submits to the jurisdiction of the Court.

Exception 2. — The Court has jurisdiction to entertain an action against a person belonging to the suite of an ambassador or diplomatic agent, if such person engages in trade (?).

(ii) *In Respect of Subject-Matter.*

RULE 39. — Subject to the exception hereinafter mentioned, the Court has no jurisdiction to entertain an action for

- (1) the determination of the title to, or the right to the possession of, any immovable situate out of England (foreign land), or
- (2) the recovery of damages for trespass to such immovable.

Exception. — The Court has jurisdiction to entertain an action against a person who is in England respecting an immovable situate out of England (foreign land), on the ground of either

- (a) a contract between the parties to the action, or
 - (b) an equity between such parties,
- with reference to such immovable.

RULE 40. — The Court has no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal law of a foreign country.

(B) WHERE JURISDICTION EXISTS.

(i) *In Respect of Persons.*

RULE 41. — Subject to Rule 38, and to the exception

hereinafter mentioned, no class of persons is, as such, excluded or exempt from the jurisdiction of the Court, *i. e.*, any person may be a party to an action or other legal proceeding in the Court.

Exception.—The Court has no jurisdiction during the continuance of war to entertain an action brought by an alien enemy, unless he is living here under the license or protection of the Crown.

The term “alien enemy” includes any British subject or citizen of a neutral state voluntarily residing during a war with Great Britain in a hostile country.

RULE 42.—The Court has jurisdiction in any kind of action over any person who has by his conduct precluded himself from objecting to the jurisdiction of the Court.

(*ii*) *In Respect of Subject-Matter.*

RULE 43.—The Court has jurisdiction to entertain proceedings for the determination of any right over or in respect of

- (1) any immovable,
 - (2) any movable,
- situate in England.

This Rule must be read subject to the Rules governing the jurisdiction of the Court in particular kinds of action or proceedings.

RULE 44.—Subject to Rules 38 to 40, the Court exercises —

- (1) Jurisdiction in actions *in personam* ;
- (2) Admiralty jurisdiction *in rem* ;
- (3) Divorce jurisdiction, and jurisdiction in relation to validity of marriage and to legitimacy ;
- (4) Jurisdiction in bankruptcy ;
- (5) Jurisdiction in matters of administration and succession ;

to the extent, and subject to the limitations, hereinafter stated in the Rules having reference to each kind of jurisdiction.

CHAPTER V.

JURISDICTION IN ACTIONS *IN PERSONAM*.

RULE 45.— When the defendant in an action *in personam* is, at the time for the service of the writ, in England, the Court has jurisdiction in respect of any cause of action, in whatever country such cause of action arises.

RULE 46.— When the defendant in an action *in personam* is, at the time for the service of the writ, not in England, the Court has (subject to the exceptions hereinafter mentioned) no jurisdiction to entertain the action.

Exception 1.— The Court has jurisdiction to entertain an action against a defendant who is not in England whenever the whole subject-matter of the action is land situate in England (with or without rents or profits).

Exception 2.— The Court has jurisdiction whenever any act, deed [will], contract, obligation, or liability affecting land or hereditaments situate in England is sought to be construed, rectified, set aside, or enforced in the action.

Exception 3.— The Court has jurisdiction whenever any relief is sought against any person domiciled or ordinarily resident in England.

Exception 4.— The Court has jurisdiction whenever the action is for the execution (as to property situate in England) of the trusts of any written instrument of which the person to be served with a writ (defendant) is a trustee, which ought to be executed according to the law of England.

Exception 5.— The Court has jurisdiction whenever the action is founded on any breach, or alleged breach, in England, of any contract, wherever made, which, according to the terms thereof, ought to be performed in England, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland.

Exception 6.— The Court has jurisdiction whenever any injunction is sought as to anything to be done in England, or any nuisance in England is sought to be prevented or removed, whether damages are or are not sought in respect thereof.

Exception 7.— Whenever any person out of England is a necessary or proper party to an action properly brought against some other person duly served with a writ in England, the Court has jurisdiction to entertain an action against such first mentioned person as a co-defendant in the action.

Exception 8.— The Court has jurisdiction to entertain an action against any two or more persons being liable as co-partners, and carrying on business in England, when sued in the name of the firm (if any) of which such persons were co-partners at the time of the accruing of the cause of action.

CHAPTER VI.

ADMIRALTY JURISDICTION *IN REM*.

RULE 47. — The Court has jurisdiction to entertain an action *in rem* against any ship, or *res* (such as cargo) connected with a ship, if

- (1) the action is an admiralty action, and
 - (2) the ship or *res* is in England, or within three miles of the coast of England,
- and not otherwise.

CHAPTER VII.

JURISDICTION IN RESPECT OF DIVORCE—
DECLARATION OF NULLITY OF MARRIAGE
— AND DECLARATION OF LEGITIMACY.

I. DIVORCE.

(A) WHERE COURT HAS JURISDICTION.

RULE 48. — The Court has jurisdiction to entertain proceedings for the dissolution of the marriage of any parties domiciled in England at the commencement of the proceedings.

This jurisdiction is not affected by

- (1) the residence of the parties, or
- (2) the allegiance of the parties, or
- (3) the domicile of the parties at the time of the marriage, or
- (4) the place of the marriage, or
- (5) the place where the offence in respect of which divorce is sought, is committed.

(B) WHERE COURT HAS NO JURISDICTION.

RULE 49. — Subject to the exception hereinafter mentioned, the Court has no jurisdiction to entertain proceed-

ings for the dissolution of the marriage of any parties not domiciled in England at the commencement of the proceedings (?).

Exception. — The Court has jurisdiction to entertain proceedings for the dissolution of a marriage between parties who are not domiciled in England at the time of the proceedings for divorce where the respondent has appeared absolutely and not under protest, and thereby submitted to the jurisdiction of the Court.

II. DECLARATION OF NULLITY OF MARRIAGE.

RULE 50. — The Court has jurisdiction to entertain a suit for the declaration of the nullity of any existing marriage celebrated in England.

III. DECLARATION OF LEGITIMACY.

RULE 51.

- (1) Any natural-born British subject, or any person whose right to be deemed a natural-born British subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the Court, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to the Court for a decree declaring that his marriage was, or is, a valid marriage; and the Court has jurisdiction to hear and determine such application, and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the Court may seem just; and such decree, except as hereinafter mentioned, is binding to all

intents and purposes on the Crown, and on all persons whomsoever.

- (2) Any person, being so domiciled or claiming as aforesaid, may apply by petition to the Court for a decree declaratory of his right to be deemed a natural-born British subject, and the Court has jurisdiction to hear and determine such application, and to make such decree thereon as to the Court may seem just; and where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition; and every decree made by the Court, except as hereinafter mentioned, is valid and binding to all intents and purposes upon the Crown and all persons whomsoever.
- (3) The decree of the Court does not in any case prejudice any person, unless such person has been cited or made a party to the proceedings, or is the heir at law or next of kin, or other real or personal representative of, or derives title under or through, a person so cited or made a party; nor shall such sentence or decree of the Court prejudice any person, if subsequently proved to have been obtained by fraud or collusion.

CHAPTER VIII.

JURISDICTION IN BANKRUPTCY AND IN REGARD TO WINDING-UP OF COMPANIES.

I. BANKRUPTCY.

(A) WHERE COURT HAS NO JURISDICTION.

RULE 52.—The Court has no jurisdiction to adjudge bankrupt any debtor who has not committed an act of bankruptcy within the terms of Rule 58.

The term "the Court," in this Rule and in Rules 53 to 58, means a Court having jurisdiction in bankruptcy, under the Bankruptcy Act, 1883, and includes

- (1) the High Court, and
- (2) any County Court having jurisdiction in bankruptcy under the said Act.

RULE 53.—The Court has no jurisdiction to adjudge bankrupt any debtor who is not a debtor subject to the English bankruptcy law.

A debtor is not "a debtor subject to the English bankruptcy law" unless he either

- (1) commits an act of bankruptcy in England, or,
- (2) being a British subject [or (semble) being domiciled in England], commits an act of bankruptcy out of England.

RULE 54.—The Court has no jurisdiction (at any rate on a bankruptcy petition being presented by a creditor) to adjudge bankrupt any debtor unless the debtor either

- (1) at the time of the presentation of the petition is domiciled in England, or
- (2) within a year before the date of the presentation of the petition has ordinarily resided, or had a dwelling-house or place of business, in England.

(B) WHERE COURT HAS JURISDICTION.

(a) *On Creditor's Petition.*

RULE 55.—Subject to the effect of Rules 53 and 54, the Court, on a bankruptcy petition being presented by a creditor, has jurisdiction to adjudge bankrupt any debtor (being otherwise liable to be adjudged bankrupt) who has committed the act of bankruptcy on which the petition is grounded within three months before the presentation of the petition.

The jurisdiction of the Court is not affected

- (1) by the fact that the debt owing to the petitioning creditor was not contracted in England, or

- (2) by the absence of the debtor from England at the time of the presentation of the petition, or
- (3) by the fact that either the creditor or the debtor is an alien.

(b) *On Debtor's Petition.*

RULE 56. — The Court has, on a bankruptcy petition being presented by a debtor, alleging that the debtor is unable to pay his debts, jurisdiction to adjudge the debtor bankrupt.

RULE 57. — The jurisdiction of the Court to adjudge bankrupt a debtor on the petition of a creditor, or on the petition of the debtor, is not taken away by the fact of the debtor being already adjudged bankrupt by the Court of a foreign country, whether such country do or do not form part of the British dominions.

(C) WHAT ACTS ARE ACTS OF BANKRUPTCY.

RULE 58. — A debtor commits an act of bankruptcy in each of the following cases [and in no other case] : —

- (a) If, in England, or *elsewhere*, he makes a conveyance or assignment of [the whole of] his property to a trustee or trustees for the benefit of his creditors generally.
- (b) If, in England, or *elsewhere*, he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof.
- (c) If, in England, or *elsewhere*, he makes any conveyance or transfer of his property, or any part thereof, or creates any charge thereon, which would [under any Act of Parliament] be void as a fraudulent preference if he were adjudged bankrupt.
- (d) If, with intent to defeat or delay his creditors, he does any of the following things, namely, departs out of England, or, being out of England, re-

mains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house.

- (e) If execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days.
- (f) If he files in the Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself.
- (g) If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him in England, or by leave of the Court elsewhere, a bankruptcy notice under the Bankruptcy Act, 1883, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained.

Any person who is for the time being entitled to enforce a final judgment is to be deemed a creditor who has obtained a final judgment within the meaning of this Rule.

- (h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

II. WINDING-UP OF COMPANIES.

(A) WHERE COURT HAS NO JURISDICTION.

RULE 59. — The Court has no jurisdiction to wind up —

- (1) Any company registered in Scotland or in Ireland ;
- (2) Any unregistered company having a principal place of business situate in Scotland or in Ireland, but not having a principal place of business situate in England ;
- (3) Any unregistered foreign company which, though carrying on business in England, has no office in England ;
- (4) Any unregistered company which does not fall within the Companies Act, 1862.

The term “the Court,” in this Rule and in Rule 60, means any Court in England having jurisdiction to wind up a company under the Companies Act, 1862, and the Acts amending the same, and includes the High Court and any other Court in England having such jurisdiction.

(B) WHERE COURT HAS JURISDICTION.

RULE 60. — Subject to the effect of Rule 59, the Court has jurisdiction to wind up —

- (1) Any company registered in England ;
- (2) Any unregistered company having a principal place of business or a branch office in England.

CHAPTER IX.

JURISDICTION IN MATTERS OF ADMINISTRATION AND SUCCESSION.

RULE 61. — In this Digest, unless the context or subject-matter otherwise requires,

- (1) “Personal property” or “personal estate” includes

- (i) any land (immovable) in which a person has less than a freehold interest (chattel real), and any land which, though not a chattel real, is by a rule of law treated as personalty ;
- (ii) any goods (movables which can be touched) ;
- (iii) any chose in action or debt (movable which cannot be touched).
- (2) "Administrator" includes an executor.
- (3) "Personal representative" includes an administrator, and also any person who, however designated, is under the law of any country entitled in such country to represent a deceased person, and, as his representative, to deal with the movables of the deceased.
- (4) "Foreign personal representative" means the personal representative of the deceased under the law of a foreign country.
- (5) "Administration" means the dealing according to law with the property of a deceased person by a personal representative.
- (6) "Succession" means beneficial succession to the property of a deceased person.
- (7) "Grant" means a grant of letters of administration or of probate of a will.
- (8) "English grant" means a grant made by the Court.
- (9) "Assets" means such personal property of a deceased person as an administrator who has obtained an English grant is bound to account for or is chargeable with.

(A) ADMINISTRATION.

RULE 62.—The Court has jurisdiction to make a grant in respect of the personal property of a deceased person, if any personal property of the deceased either

(1) is locally situate in England at the time of his death, or

(2) has become locally situate in England at any time since his death,

and not otherwise.

The locality of the deceased's personal property under this Rule is not affected by his domicile at the time of his death.

(B) SUCCESSION.

RULE 63.—Where the Court has no jurisdiction to make a grant, the Court has no jurisdiction with regard to the succession to the personal property of a deceased person.

RULE 64.—Where the Court has jurisdiction to make a grant, the Court has, in general, jurisdiction to determine any question with regard to the succession to the assets of a deceased person.

CHAPTER X.

EXTRA-TERRITORIAL EFFECT OF

ENGLISH JUDGMENT;

ENGLISH BANKRUPTCY;

ENGLISH GRANT OF ADMINISTRATION.

(A) ENGLISH JUDGMENT.

RULE 65.—A judgment of the Court (called in this Digest an English judgment) has, subject to the exception hereinafter mentioned, no direct operation out of England.

The extra-territorial effect (if any) of an English judgment is a question of foreign law.

Exception.—An English judgment for any debt, damages, or costs may be rendered operative in Ireland or Scotland by registration of a certificate thereof in accordance with the provisions of Rule 101.

(B) ENGLISH BANKRUPTCY AND WINDING-UP OF COMPANIES.

I. BANKRUPTCY.

(i) *As an Assignment.*

RULE 66. — An assignment of a bankrupt's property to the trustee in bankruptcy under the Bankruptcy Act, 1883 (English bankruptcy), is, or operates as, an assignment of the bankrupt's

(1) immovables (land),

(2) movables,

whether situate in England or elsewhere.

(ii) *As a Discharge.*

RULE 67. — A discharge under an English bankruptcy from any debt or liability is, in any country forming part of the British dominions, a discharge from such debt or liability wherever or under whatever law the same has been contracted or has arisen.

II. WINDING-UP.

RULE 68. — The winding-up of a company impresses the whole of its property with a trust for application in the course of the winding-up, for the benefit of the persons interested in the winding-up (?).

(C) ENGLISH GRANT OF ADMINISTRATION.

RULE 69. — An English grant has no direct operation out of England.

This Rule must be read subject to Rules 73 to 75.

RULE 70. — An English grant extends to all the movables of the deceased, wherever situate, at the time of his death, at least in such a sense that a person who has obtained an English grant (who is hereinafter called an English administrator) may

- (1) sue in an English Court in relation to movables of the deceased situate in any foreign country ;
- (2) receive or recover in a foreign country movables of the deceased situate in such country (?).

RULE 71. — When a person dies domiciled in England, the Courts of any foreign country ought, by means of a grant or otherwise, to enable the English administrator to act as personal representative of the deceased in such foreign country.

RULE 72. — The following personal property of a deceased person passes to the administrator under an English grant : —

- (1) Any personal property of the deceased which at the time of his death is locally situate in England.
- (2) Any personal property of the deceased received, recovered, or otherwise reduced into possession by the English administrator as such administrator.
- (3) Any goods of the deceased which after his death are brought into England before any person has, in a foreign country where they are situate, obtained a good title thereto under the law of such foreign country (*lex situs*) [and reduced them into possession (?)].

Extension of English Grant to Ireland and Scotland.

RULE 73. — An English grant will, on production of the said grant to, and deposition of a copy thereof with, the proper officer of the High Court of Justice in Ireland, be sealed with the seal of the said Court, and be of the like force and effect, and have the same operation in Ireland, as a grant of probate or letters of administration made by the said Court.

The latter grant is hereinafter referred to as an Irish grant.

RULE 74. — An English grant made to the administrator of any person duly stated to have died domiciled in England will, on production of the said grant to, and de-

position of a copy thereof with, the clerk of the Sheriff Court of the County of Edinburgh, be duly indorsed with the proper certificate by the said clerk and thereupon have the same operation in Scotland as if a confirmation had been granted by the said Court.

RULE 75. — Whenever the Colonial Probates Act, 1892, is by Order in Council applied to any British possession, *i. e.*, to any part of the British dominions not forming part of the United Kingdom, adequate provision is made for the recognition in that possession of an English Grant.

PART II.

JURISDICTION OF FOREIGN COURTS.

CHAPTER XI.

GENERAL RULES AS TO JURISDICTION.

RULE 76. — In this Digest

- (1) "Proper Court" means a Court which is authorised by the sovereign, under whose authority such Court acts, to adjudicate upon a given matter.
- (2) "Court of competent jurisdiction" means a Court acting under the authority of a sovereign of a country who, as the sovereign of such country, has, according to the principles maintained by English Courts, the right to adjudicate upon a given matter.

When in this Digest

- (i) it is stated that the Courts of a foreign country "have jurisdiction," it is meant that they are Courts of competent jurisdiction ;
- (ii) it is stated that the Courts of a foreign country "have no jurisdiction," it is meant that they are not Courts of competent jurisdiction.

- (3) "Foreign judgment" means a judgment, decree, or order of the nature of a judgment (by whatever name it be called) which is pronounced or given by a foreign Court.

(A) WHERE JURISDICTION DOES NOT EXIST.

(i) *In Respect of Persons.*

RULE 77.—The Courts of a foreign country have no jurisdiction over (*i. e.*, are not Courts of competent jurisdiction as against)

- (1) any sovereign,
- (2) any ambassador, or other diplomatic agent, accredited to the sovereign of such foreign country.

(ii) *In Respect of Subject-Matter.*

RULE 78.—The Courts of a foreign country have no jurisdiction —

- (1) to adjudicate upon the title or the right to the possession, of any immovable not situate in such country, or
- [(2) (semble) to give redress for any injury in respect of any immovable not situate in such country (?).]

(B) WHERE JURISDICTION DOES EXIST.

RULE 79.—Subject to Rules 77 and 78, the Courts of a foreign country have jurisdiction (*i. e.*, are Courts of competent jurisdiction) —

- (1) in an action or proceeding *in personam* ;
 - (2) in an action or proceeding *in rem* ;
 - (3) in matters of divorce, or having reference to the validity of a marriage ;
 - (4) in matters of administration and succession ;
- to the extent, and subject to the limitations, hereinafter stated in the Rules having reference to each kind of jurisdiction.

CHAPTER XII.

JURISDICTION IN ACTIONS *IN PERSONAM*.

RULE 80. — In an action *in personam* in respect of any cause of action, the Courts of a foreign country have jurisdiction in the following cases : —

Case 1. — Where at the time of the commencement of the action the defendant was resident [or present?] in such country, so as to have the benefit, and be under the protection, of the laws thereof.

Case 2. — Where the defendant is, at the time of the judgment in the action, a subject of the sovereign of such country.

Case 3. — Where the party objecting to the jurisdiction of the Courts of such country has, by his own conduct, precluded himself from objecting thereto —

- (a) by appearing as plaintiff in the action, or
- (b) by voluntarily appearing as defendant in such action without protest, or
- (c) by having expressly or impliedly contracted to submit to the jurisdiction of such Courts.

RULE 81. — In an action *in personam* the Courts of a foreign country probably do not acquire jurisdiction either —

- (1) from the mere possession by the defendant at the commencement of the action of property locally situate in that country, or
- (2) from the presence of the defendant in such country at the time when the obligation in respect of which the action is brought was incurred in that country.

CHAPTER XIII.

JURISDICTION IN ACTIONS *IN REM*.

RULE 82.— In an action or proceeding *in rem* the Courts of a foreign country have jurisdiction to determine the title to any immovable or movable within such country.

CHAPTER XIV.

JURISDICTION IN MATTERS OF DIVORCE AND
AS REGARDS VALIDITY OF MARRIAGE.

I. DIVORCE.

(A) WHERE COURTS HAVE JURISDICTION.

RULE 83.— Subject to the possible exception herein-after mentioned, the Courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of the proceedings for divorce.

This Rule applies to

- (1) an English marriage,
- (2) a foreign marriage.

Exception.— The Courts of a foreign country, possibly, have no jurisdiction to dissolve an English marriage for any cause for which a divorce could not be obtained in England (??).

(B) WHERE COURTS HAVE NO JURISDICTION.

RULE 84.— Subject to the possible exception hereinafter mentioned, the Courts of a foreign country have no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of the proceedings for divorce.

Exception.— The Courts of a foreign country, where the parties to a marriage are not domiciled, possibly, have jurisdiction to dissolve their marriage, if the divorce granted by such Courts would be held valid by the Courts of the country where the parties are domiciled.

II. VALIDITY OF MARRIAGE.

RULE 85. — The Courts of a foreign country have (semble) jurisdiction to determine the validity of any marriage celebrated in such country (?).

CHAPTER XV.

JURISDICTION IN MATTERS OF ADMINISTRATION AND SUCCESSION.

RULE 86. — The Courts of a foreign country have jurisdiction to administer, and to determine the succession to, all immovables and movables of a deceased person locally situate in such country.

This jurisdiction is unaffected by the domicile of the deceased.

RULE 87. — The Courts of a foreign country have jurisdiction to determine the succession to all movables wherever locally situate of a testator or intestate dying domiciled in such country.

CHAPTER XVI.

EFFECT OF FOREIGN JUDGMENTS IN ENGLAND.

I. GENERAL.

(i) No Direct Operation.

RULE 88. — A foreign judgment has no direct operation in England.

This Rule must be read subject to the effect of Rule 101.

(ii) Invalid Foreign Judgments.

RULE 89. — Any foreign judgment which is not pronounced by a Court of competent jurisdiction is invalid.

Whether a Court which has pronounced a foreign judgment is, or is not, a Court of competent jurisdiction in respect of the matter adjudicated upon by the Court is to be determined in accordance with Rules 76 to 87.

The validity of a foreign judgment is not, in general, affected by the fact that the Court which pronounces the judgment is not a proper Court (?).

RULE 90. — A foreign judgment is invalid which is obtained by fraud.

Such fraud may be either —

- (1) fraud on the part of the party in whose favour the judgment is given ; or
- (2) fraud on the part of the Court pronouncing the judgment.

RULE 91. — A foreign judgment is, possibly, invalid when the Court pronouncing the judgment refuses to give such recognition to the law of other nations as is required by the principles of private international law (?).

RULE 92. — A foreign judgment may sometimes be invalid on account of the proceedings in which the judgment was obtained being opposed to natural justice (*e. g.*, owing to want of due notice to the party affected thereby). But in such a case the Court is (generally) not a Court of competent jurisdiction.

RULE 93. — A foreign judgment shown to be invalid under any of the foregoing Rules, 89 to 92, is hereinafter termed an invalid foreign judgment.

RULE 94. — An invalid foreign judgment has (subject to the possible exception hereinafter mentioned) no effect.

Exception. — An invalid foreign judgment *in rem* may possibly have an effect in England as an assignment, though not as a judgment.

(iii) *Valid Foreign Judgments.*

RULE 95. — A foreign judgment, which is not an invalid foreign judgment under Rules 89 to 92, is valid, and is hereinafter termed a valid foreign judgment.

RULE 96. — Any foreign judgment is presumed to be a valid foreign judgment unless and until it is shown to be invalid.

RULE 97. — A valid foreign judgment is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either

- (1) of fact, or
- (2) of law.

RULE 98. — A valid foreign judgment has the effects stated in Rules 99 to 105; and these effects depend upon the nature of the judgment.

II. PARTICULAR KINDS OF JUDGMENTS.

(A) JUDGMENT *in Personam*.

(a) *As Cause of Action*.

RULE 99. — Subject to the possible exception hereinafter mentioned, a valid foreign judgment *in personam* may be enforced by an action for the amount due under it if the judgment is

- (1) for a debt, or definite sum of money, and
- (2) final and conclusive,

but not otherwise.

Provided that a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given.

Exception. — An action (seemble) cannot be maintained on a valid foreign judgment if the cause of action in respect of which the judgment was obtained was of such a character that it would not have supported an action in England (?).

SUB-RULE. — A valid foreign judgment does not of itself extinguish the original cause of action in respect of which the judgment was given.

(b) *As Defence*.

RULE 100. — A valid foreign judgment *in personam*, if it is final and conclusive on the merits (but not otherwise), is a good defence to an action for the same matter when either

- (1) the judgment was in favour of the defendant, or
- (2) the judgment, being in favour of the plaintiff, has been followed by execution or satisfaction [*i. e.*, has been satisfied].

(c) *Extension of Certain Judgments in Personam of Superior Court in one Part of United Kingdom to any other Part.*

RULE 101. — A judgment of a Superior Court in any part of the United Kingdom for any debt, damages, or costs, has, on a certificate thereof being duly registered in a Superior Court of any other part of the United Kingdom, from the date of such registration the same force and effect as a judgment of the Court in which the certificate is registered, and may be enforced by execution, or otherwise, in the same manner as if it had been a judgment originally obtained at the date of such registration as aforesaid in the Court in which the certificate is registered.

The term “Superior Court” means in this Rule

- (1) as applied to England, the High Court of Justice in England ;
- (2) as applied to Ireland, the High Court of Justice in Ireland ;
- (3) as applied to Scotland, the Court of Session in Scotland.

This Rule does not apply to any judgment (decreet) pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland.

(B) *JUDGMENT in Rem.*

RULE 102. — A valid foreign judgment *in rem* in respect of the title to a movable gives a valid title to the movable in England to the extent to which such title is given by or under the judgment in the country where the judgment is pronounced.

RULE 103. — A valid foreign judgment *in rem* given by

a Court of Admiralty can be enforced in the High Court by proceedings against the ship or other property affected by the judgment.

(C) JUDGMENT, OR SENTENCE, OF DIVORCE.

RULE 104. — A valid foreign judgment, or sentence, of divorce has in England the same effect as a divorce granted by the Court.

(D) JUDGMENT IN MATTERS OF SUCCESSION.

RULE 105. — A valid foreign judgment in matters of succession is binding upon, and is to be followed by, the Court.

CHAPTER XVII.

EFFECT IN ENGLAND OF
FOREIGN BANKRUPTCY;

FOREIGN GRANT OF ADMINISTRATION.

(A) FOREIGN BANKRUPTCY.

I. AS AN ASSIGNMENT.

Bankruptcy in Ireland or Scotland.

RULE 106. — An assignment of a bankrupt's property to the representative of his creditors —

(1) under the Irish Bankrupt and Insolvent Act, 1857
(Irish Bankruptcy), or

(2) under the Bankruptcy (Scotland) Act, 1856 (Scotch Bankruptcy),

is, or operates as, an assignment to such representative of the bankrupt's

(i) immovables (land),

(ii) movables,

wherever situate.

Bankruptcy in any Foreign Country, except Ireland or Scotland.

RULE 107. — An assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country not forming part of the United Kingdom, is not, and does not operate as, an assignment of any immovables of the bankrupt situate in England.

RULE 108. — An assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country where the bankrupt is domiciled, is, or operates as, an assignment of the movables of the bankrupt situate in England (?).

RULE 109. — Subject to the effect of Rule 106, an assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country where the bankrupt is not domiciled, does not operate as an assignment of the movables of the bankrupt situate in England.

English and Foreign Bankruptcy.

RULE 110. — Where a debtor has been made bankrupt in more countries than one, and, under the bankruptcy law of each of such countries, there has been an assignment of the bankrupt's property, which might, under any of the foregoing Rules, operate as an assignment of his property in England, effect will be given in England to that assignment which is earliest in date.

II. AS A DISCHARGE.

RULE 111. — A discharge under the bankruptcy law of any country from any debt or liability is in such country a discharge from such debt or liability, wherever it has been contracted or has arisen.

RULE 112. — A discharge from any debt or liability under the bankruptcy law of the country where the debt or

liability has been contracted or has arisen [or perhaps where it is to be paid or satisfied?] is a discharge therefrom in England.

RULE 113. — Subject to Rule 114, the discharge from any debt or liability under the bankruptcy law of a country where such debt or liability has neither

(1) been contracted or has arisen, nor

(2) is to be paid or satisfied,

is not a discharge therefrom in England.

RULE 114. — A discharge from any debt or liability under a Bankruptcy Act of the Imperial Parliament, and hence under

(1) an English bankruptcy,

(2) an Irish bankruptcy,

(3) a Scotch bankruptcy,

is, in any country forming part of the British dominions, a discharge from such debt or liability wherever, or under whatever law, the same has been contracted or has arisen.

(B) FOREIGN GRANT OF ADMINISTRATION.

RULE 115. — A grant of administration, or other authority to represent a deceased person under the law of a foreign country, has no operation in England.

This Rule must be read subject to the effect of Rules 119 to 121.

RULE 116. — Where a person dies domiciled in a foreign country, the Court will (in general) make a grant to his personal representative under the law of such foreign country.

RULE 117. — A foreign personal representative has (semble) a good title in England to any movables of the deceased which

(1) if they are movables which can be touched, *i. e.*, goods, he has in any foreign country acquired a good title to under the *lex situs* [and has reduced into possession (?)];

(2) if they are movables which cannot be touched,

i. e., debts or other choses in action, he has in a foreign country acquired a good title to under the *lex situs*, and has reduced into possession.

RULE 118. — A foreign personal representative is not, as such, under any liability in England, and cannot, as foreign personal representative, be sued in England.

Provided that

- (1) if the foreign personal representative sends or brings into England movables of a deceased which have not been so appropriated as to lose their character as part of the property of the deceased, an action, to which the English administrator must be a party, may be brought for their administration in England;
- (2) the foreign personal representative may by his dealing with the property of the deceased incur personal liability in England.

Extension of Irish Grant and Scotch Confirmation to England.

RULE 119. — An Irish grant will, on production of the said grant to, and deposition of a copy thereof with, the proper officer of the High Court of Justice in England, be sealed with the seal of the said Court, and be thereupon of the like force and effect, and have the same operation in England, as an English grant.

RULE 120. — A Scotch confirmation of the executor of a person duly stated to have died domiciled in Scotland, which includes besides the personal estate situate in Scotland also personal estate situate in England, will, on production of such confirmation in the High Court in England and deposition of a copy thereof with the proper officer of the said Court, be sealed with the seal of the said Court, and have thereupon in England the like force and effect as an English grant.

Extension of Colonial Grant to England.

RULE 121. — Whenever the Colonial Probates Act, 1892, is by Order in Council made applicable to any British possession, *i. e.*, to any part of the British dominions not forming part of the United Kingdom, the grant of probate or letters of administration will on

(1) payment of the proper duty, and

(2) production of the said grant to, and deposition of a copy thereof with, the High Court in England,

be sealed with the seal of the said Court, and thereupon be of the like force and effect, and have the same operation in England, as an English grant.

BOOK III.**CHOICE OF LAW.****CHAPTER XVIII.****STATUS.**

RULE 122. — Transactions taking place in England are not affected by any status existing under foreign law which either

(1) is of a kind unknown to English law, or.

(2) is penal.

RULE 123. — Any status existing under the law of a person's domicile is recognised by the Court as regards all transactions taking place wholly within the country where he is domiciled.

RULE 124. — In cases which do not fall within Rule 122, the existence of a status existing under the law of a person's domicile is recognised by the Court, but such recognition does not necessarily involve the giving effect to the results of such status.

CHAPTER XIX.

STATUS OF CORPORATIONS.

RULE 125. — The existence of a foreign corporation duly created under the law of a foreign country is recognised by the Court.

RULE 126. — The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country where the transaction occurs.

CHAPTER XX.

FAMILY RELATIONS.

(A) HUSBAND AND WIFE.

RULE 127. — The authority of a husband as regards the person of his wife while in England is not affected by the nationality or the domicil of the parties, but is governed wholly by the law of England.

(B) PARENT AND CHILD.

RULE 128. — The authority of a parent as regards the person of his child while in England is not affected by the nationality or the domicil of the parties, but is governed wholly by the law of England.

RULE 129. — The rights of a parent domiciled in a foreign country over the movables in England belonging to a minor are, possibly, governed by the law of the parent's domicil, but are more probably governed, while the minor is in England, by the law of England.

(C) GUARDIAN AND WARD.

RULE 130. — A guardian appointed under the law of a foreign country (called hereinafter a foreign guardian) has no direct authority as guardian in England ; but the Court recognises the existence of a foreign guardianship, and may,

in its discretion, give effect to a foreign guardian's authority over his ward.

RULE 131. — A foreign guardian has, unless interfered with by the Court, control over the person of his ward while in England.

RULE 132. — A foreign guardian cannot dispose of movables situate in England belonging to his ward (?).

(D) LEGITIMACY.

RULE 133. — A child born anywhere in lawful wedlock is legitimate.

RULE 134. — The law of the father's domicile at the time of the birth of a child born out of lawful wedlock, and the law of the father's domicile at the time of the subsequent marriage of the child's parents, determine whether the child becomes, or may become, legitimate in consequence of the subsequent marriage of the parents (*legitimatio per subsequens matrimonium*).

Case 1. — If both the law of the father's domicile at the time of the birth of the child and the law of the father's domicile at the time of the subsequent marriage allow of *legitimatio per subsequens matrimonium*, the child becomes, or may become, legitimate on the marriage of the parents.

Case 2. — If the law of the father's domicile at the time of the birth of the child does not allow of *legitimatio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents.

Case 3. — If the law of the father's domicile at the time of the subsequent marriage of the child's parents does not allow of *legitimatio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents.

Provided that a person born out of lawful wedlock cannot be heir to English real estate, nor can any one, except his issue, inherit English real estate from him.

(E) LUNATIC AND CURATOR, OR COMMITTEE.

RULE 135. — A foreign decree or commission appointing a person curator or committee of a lunatic resident in a foreign country does not of itself empower the curator or committee to deal with the person or property of the lunatic in England.

RULE 136. — If a curator or committee, duly appointed under a foreign decree, applies to the Court to have the person of the lunatic delivered to him, or for the payment to him of money belonging to the lunatic, the Court may in its discretion grant or refuse the application.

CHAPTER XXI.

NATURE OF PROPERTY.

RULE 137. — The law of a country where a thing is situate (*lex situs*) determines whether

(1) the thing itself, or

(2) any right, obligation, or document connected with the thing

is to be considered an immovable or a movable (??).

CHAPTER XXII.

IMMOVABLES.

RULE 138. — All rights over, or in relation to, an immovable (land) are (subject to the exceptions hereinafter mentioned) governed by the law of the country where the immovable is situate (*lex situs*).

Exception 1. — The interpretation of a contract with regard to an immovable, and the rights and obligations under it of the parties thereto, are, probably, to be determined in accordance with the proper law of the contract, which need not, though it generally does, coincide with the *lex situs*.

Exception 2. — Under Exceptions 1 and 2 to Rule 182 [*i. e.*, under the Wills Act, 1861, sections 1 and 2], a will made by a *British subject* may (possibly), as regards such immovables in the United Kingdom as form part of his per-

sonal estate, be valid as to form, though not made in accordance with the formalities required by the *lex situs* (??).

Exception 3.— The limitation to an action or other proceeding with regard to an immovable is (probably) governed by the *lex fori* (?).

CHAPTER XXIII.

MOVABLES.

Capacity.

RULE 139.— A person's capacity to assign a movable, or any interest therein, is governed by the law of his domicile (*lex domicilii*) at the time of the assignment (?).

This Rule must be read subject to the effect of Rules 140 and 141.

Assignment of Movables in Accordance with Lex Situs.

RULE 140.— An assignment of a movable which can be touched (goods), giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (*lex situs*), is valid.

RULE 141.— An assignment of a movable which cannot be touched, *i. e.*, of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt), is valid.

Provided that

- (1) the liabilities of the debtor are to be determined by the law governing the contract between him and the creditor;
- (2) the right to recover the debt is, as regards all matters of procedure, governed by the *lex fori*.

RULE 142.— Subject to the exception hereinafter mentioned, and to Rules 140 and 141, the assignment of a movable, wherever situate, in accordance with the law of the owner's domicile is valid.

Exception.— When the law of the country where a movable is situate (*lex situs*) prescribes a special form of transfer, an assignment according to the law of the owner's domicile (*lex domicilii*) is, if the special form is not followed, invalid.

CHAPTER XXIV.

CONTRACTS. — GENERAL RULES.

(A) *PRELIMINARY.*

RULE 143. — In this Digest, the term “proper law of a contract” means the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves.

RULE 144. — Where any Act of Parliament intended to have extra-territorial operation makes any contract

(1) valid, or

(2) invalid,

the validity or invalidity, as the case may be, of such contract must be determined in accordance with such Act of Parliament independently of the law of any foreign country whatever.

RULE 145. — A contract otherwise valid cannot be enforced if its enforcement is opposed to any English rule of procedure.

(B) *VALIDITY OF CONTRACT.*(i) *Capacity.*

RULE 146. — Subject to the exceptions hereinafter mentioned, a person's capacity to enter into a contract is governed by the law of his domicile (*lex domicilii*) at the time of the making of the contract.

(1) If he has such capacity by that law, the contract is, in so far as its validity depends upon his capacity, valid.

(2) If he has not such capacity by that law, the contract is invalid.

Exception 1. — A person's capacity to bind himself by an ordinary mercantile contract is (probably) governed by the law of the country where the contract is made (*lex loci contractus*) (?).

Exception 2. — A person's capacity to contract in respect of an immovable (land) is governed by the *lex situs*.

(ii) *Form.*

RULE 147. — Subject to the exceptions hereinafter mentioned, the formal validity of a contract is governed by the law of the country where the contract is made (*lex loci contractus*).

(1) Any contract is formally valid which is made in accordance with any form recognised as valid by the law of the country where the contract is made (which form is, in this Digest, called the local form).

(2) No contract is valid which is not made in accordance with the local form.

Exception 1. — The formal validity of a contract with regard to an immovable depends upon the *lex situs* (?).

Exception 2. — A contract made in one country in accordance with the local form in respect of a movable situate in another country may possibly be invalid, if it does not comply with the special formalities (if any) required by the law of the country where the movable is situate at the time of the making of the contract (*lex situs*).

Exception 3. — Possibly a contract made in one country, but intended to operate wholly in, and to be subject to, the law of another country, may be valid, even though not made in accordance with the local form, if it be made in accordance with the form required, or allowed, by the law of the country where the contract is to operate, and subject to the law whereof it is made (?).

Exception 4. — In certain cases a bill of exchange may be treated as valid, though it does not comply with the requirements, as to form, of the law of the country where the contract is made.

(iii) *Essential Validity.*

RULE 148. — The essential validity of a contract is (subject to the exceptions hereinafter mentioned) governed indirectly by the proper law of the contract.

Exception 1. — A contract (whether lawful by its proper law or not) is invalid if it, or the enforcement thereof, is opposed to English interests of state, or to the policy of English law, or to the moral rules upheld by English law.

Exception 2. — A contract (whether lawful by its proper law or not) is invalid if the making thereof is unlawful by the law of the country where it is made (*lex loci contractus*) (?).

Exception 3. — A contract (whether lawful by its proper law or not) is, in general, invalid in so far as

- (1) the performance of it is unlawful by the law of the country where the contract is to be performed (*lex loci solutionis*) ; or
- (2) the contract forms part of a transaction which is unlawful by the law of the country where the transaction is to take place.

This Exception (semble) does not apply to any contract made in violation, or with a view to the violation, of the revenue laws of any foreign country not forming part of the British dominions.

(C) *THE INTERPRETATION AND OBLIGATION OF CONTRACT.*

RULE 149. — The interpretation of a contract and the rights and obligations under it of the parties thereto are to be determined in accordance with the proper law of the contract.

Sub-Rules for determining the Proper Law of a Contract in Accordance with the Intention of the Parties.

SUB-RULE 1. — When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract and, in general, overrides every presumption.

SUB-RULE 2. — When the intention of the parties to a contract, with regard to the law governing the contract, is not expressed in words, their intention is to be inferred from the terms and nature of the contract and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.

SUB-RULE 3. — In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect : —

First Presumption. — *Primâ facie*, the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*) ; this presumption applies with special force when the contract is to be performed wholly in the country where it is made or may

be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country.

Second Presumption.—When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*).

(D) DISCHARGE OF A CONTRACT.

RULE 150.—The validity of the discharge of a contract (otherwise than by bankruptcy) depends upon the proper law of the contract (?).

- (1) A discharge in accordance with the proper law of the contract is valid.
- (2) A discharge not in accordance with the proper law of the contract is not valid (?).

CHAPTER XXV.

PARTICULAR CONTRACTS.

(A) CONTRACTS WITH REGARD TO IMMOVABLES.

RULE 151. — The effect of a contract with regard to an immovable is governed by the proper law of the contract (?).

The proper law of such contract is, in general, the law of the country where the immovable is situate (*lex situs*).

(B) CONTRACTS WITH REGARD TO MOVABLES.

RULE 152. — The effect of a contract with regard to a movable is governed by the proper law of the contract.

(C) CONTRACT OF AFFREIGHTMENT.

RULE 153. — The term “law of the flag” means the law of the country whereof a ship carries the flag.

When the flag carried by a ship is that of a state including more than one country, the law of the flag means (semble) the law of the country where the ship is registered.

RULE 154. — Subject to the exception hereinafter mentioned, the effect and incidents of a contract of affreightment (*i. e.*, a contract with a shipowner to hire his ship, or part of it, for the carriage of goods) are governed by the law of the flag.

Provided that the contract will not be governed by the law of the flag, if from the terms or objects of the contract, or from the circumstances under which it was made, the inference can be drawn that the parties did not intend the law of the flag to apply.

Exception. — The mode of performing particular acts under a contract of affreightment (*e. g.*, the loading or unloading or delivery of goods) may be governed by the law of the country where such acts take place.

SUB-RULE. — The authority of the master of a ship to deal with the cargo during the voyage, and the manner in which he should execute it, are governed by the law of the flag.

**(D) CONTRACT FOR THROUGH CARRIAGE OF
PERSON OR GOODS.**

RULE 155. — The effect of a contract for the carriage of person or goods from a place in one country to a place in another is, as to its general incidents, presumably governed by the law of the place where it is made; but, as to transactions taking place in a particular country, may in certain cases be governed by the law of such country.

(E) AVERAGE ADJUSTMENT.

RULE 156. — As amongst the several owners of property saved by a sacrifice, the liability to general average is governed by the law of the place (called hereinafter the place of adjustment) at which the common voyage terminates (that is to say) —

- (1) when the voyage is completed in due course, by the law of the port of destination, or
- (2) when the voyage is not so completed, by the law of the place where the voyage is rightly broken up and the ship and cargo part company.

RULE 157. — An underwriter is bound by an average adjustment duly taken according to the law of the place of adjustment.

RULE 158. — An English insurer of goods shipped by an English merchant on board a foreign ship is not affected by the law of the flag.

(F) *PROVISIONS OF BILLS OF EXCHANGE
ACT, 1882, AS TO CONFLICT OF LAWS.*

*Bill of Exchange.*¹

[RULE 159. — Bills of Exchange Act, 1882, s. 2 (part) and s. 4.] In this Act, unless the context otherwise requires: —

- [1] “Acceptance” means an acceptance completed by delivery or notification.
- [2] “Bearer” means the person in possession of a bill or note which is payable to bearer.
- [3] “Bill” means bill of exchange, and “note” means promissory note.
- [4] “Delivery” means transfer of possession, actual or constructive, from one person to another.
- [5] “Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.
- [6] “Indorsement” means an indorsement completed by delivery.
- [7] “Issue” means the first delivery of a bill or note, complete in form, to a person who takes it as a holder.
- [8] “Person” includes a body of persons, whether incorporated or not.

¹ Rules 159–163 are taken verbatim, with the exception of words or figures in square brackets, from the Bills of Exchange Act, 1882.

[9] "Value" means valuable consideration.

[10] "Written" includes printed, and "writing" includes print.

[11] (1) An inland bill is a bill which is or on the face of it purports to be

(a) both drawn and payable within the British Islands, or

(b) drawn within the British Islands upon some person resident therein.

Any other bill is a foreign bill.

For the purposes of this Act, "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

(2) Unless the contrary appear on the face of the bill, the holder may treat it as an inland bill.

[RULE 160. — Bills of Exchange Act, 1882, s. 72.]
Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity, as regards requisites in form, of the supervening contracts, such as acceptance, or indorsement, or acceptance *suprà* protest, is determined by the law of the place where such contract was made.

Provided that—

(a) Where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

(b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of

enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

- (2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà* protest of a bill is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country [*i. e.*, a country not forming part of the British Islands], the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom.

- (3) The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.
- (4) Where a bill is drawn out of, but payable in, the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.
- (5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

[RULE 161. — Bills of Exchange Act, 1882, s. 57.]
Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows: —

- (1) The holder may recover from any party liable on the bill, and the drawer who has been compelled

to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor, or from the drawer, or from a prior indorser —

- (a) The amount of the bill :
 - (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case :
 - (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.
- (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange, with interest thereon until the time of payment.
- (3) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part; and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

Promissory Note.

[RULE 162. — Bills of Exchange Act, 1882, s. 83 (1).]
A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.

[RULE 163. — Bills of Exchange Act, 1882, s. 89.]

- (1) Subject to the provisions in this part [*i. e.*, Part IV. of the Bills of Exchange Act, 1882], and

except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

- (2) In applying those provisions, the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.
- (3) The following provisions as to bills do not apply to notes ; namely, provisions relating to —
 - (a) Presentment for acceptance ;
 - (b) Acceptance ;
 - (c) Acceptance *suprà* protest ;
 - (d) Bills in a set.
- (4) Where a foreign note is dishonoured, protest thereof is unnecessary.

(G) *FOREIGN NEGOTIABLE INSTRUMENTS.*

RULE 164. — A foreign instrument (*e. g.*, the bond of a foreign government) which is both

- (1) negotiable by the law of the country where it is sued, and
 - (2) negotiable by custom in England,
- is a negotiable instrument in England.

RULE 165. — A foreign instrument (*e. g.*, a bond of a foreign government) is not a negotiable instrument in England unless it fulfils the requirements of Rule 164.

(H) *INTEREST.*

RULE 166. — The liability to pay interest, and the rate of interest payable in respect of a debt or loan, is determined by the proper law of the contract under which the debt is incurred or the loan is made.

*(I) CONTRACTS THROUGH AGENTS.**Contract of Agency.*

RULE 167. — An agent's authority as between himself and his principal is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created.

Relation of Principal and Third Party.

RULE 168. — When a principal in one country contracts in another country through an agent, the rights and liabilities of the principal as regards third parties are, in general, governed by the law of such other country, *i. e.*, the country where the contract is made (*lex loci contractus*).

CHAPTER XXVI.

MARRIAGE.

(A) VALIDITY OF MARRIAGE.

RULE 169. — Subject to the exceptions hereinafter mentioned, a marriage is valid when

- (1) each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other, *and*
- (2) any one of the following conditions as to the form of celebration is complied with (that is to say):
 - (i) if the marriage is celebrated in accordance with the local form; or
 - (ii) if the parties enjoy the privilege of *ex-territoriality*, and the marriage is celebrated in accordance with any form recognised as valid by the law of the state to which they belong; or

- (iii) if the marriage [being between British subjects?] is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible; or
- (iv) if the marriage is celebrated in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892, s. 22, within the lines of a British army serving abroad; or
- (v) if the marriage being between parties, one of whom at least is a British subject, is celebrated outside the United Kingdom in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892, by or before a marriage officer (such, for example, as a British ambassador or British consul) within the meaning of, and duly authorised to be a marriage officer under, the said Act.

In this Digest, the term "marriage" means the voluntary union for life of one man and one woman to the exclusion of all others.

Exception 1. — A marriage is not valid which is incestuous by the laws of all Christian countries.

Exception 2. — A marriage is not valid if either of the parties, being a descendant of George II., marries in contravention of the Royal Marriage Act, 12 Geo. III. cap. 11.

Exception 3. — A marriage is, possibly, not valid if *either* of the parties is, according to the law of the country where the marriage is *celebrated*, under an incapacity to marry the other.

RULE 170. — Subject to the exceptions hereinafter mentioned, no marriage is valid which does not comply, both as to the capacity of the parties and the form of celebration, with Rule 169.

Exception 1. — A marriage celebrated in England is, possibly, not rendered invalid by the incapacity of the wife according to the law of her domicile to marry the husband, if the husband, being domiciled in England, is by English law under no incapacity to marry the wife.

Exception 2. — A marriage celebrated in England is not invalid on account of any incapacity of either of the parties which, though imposed by the law of his or her domicile, is of a kind to which our Courts refuse recognition.

Exception 3. — Any marriage is valid which is made valid by Act of Parliament.

(B) *ASSIGNMENT OF MOVABLES IN CONSEQUENCE OF MARRIAGE.*

RULE 171. — Where there is no marriage contract or settlement, the mutual rights of husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are (subject to the possible exception hereinafter mentioned) governed by the law of the husband's actual [or intended?] domicile at the time of the marriage, without reference to the law of the country

(1) where the marriage is celebrated, or

(2) where the wife is domiciled before marriage.

The husband's actual [or intended?] domicile at the time of the marriage is hereinafter termed "the matrimonial domicile."

Exception. — Where the domicile of the parties is changed after marriage, the mutual rights of husband and wife over each other's subsequently acquired movables are (possibly) governed by the law of their domicile at the time of the acquisition.

RULE 172. — Where there is a marriage contract or settlement, the terms of the contract or settlement govern the rights of husband and wife in respect of all movables within its terms which are then acquired or are afterwards acquired.

SUB-RULE 1. — A marriage contract or settlement will, in the absence of reason to the contrary, be construed with reference to the law of the matrimonial domicile.

SUB-RULE 2. — The parties may make it part of the contract or settlement that their rights shall be subject to some other law than the law of the matrimonial domicile, in which case their rights will be determined with reference to such other law.

SUB-RULE 3. — The law of the matrimonial domicile will,

in general, decide whether particular property (*e. g.*, any future acquisition) is included within the terms of the marriage contract or settlement.

SUB-RULE 4. — The effect or construction of the marriage contract or settlement is not varied by a subsequent change of domicile.

RULE 173. — The mutual rights of husband and wife in respect of succession to movables on the death of the other are, in so far as they are not determined by any marriage contract or settlement, governed by the law of the deceased's domicile at the time of his or her death.

CHAPTER XXVII.

TORTS.

RULE 174. — Whether an act done in a foreign country is or is not a tort (*i. e.*, a wrong for which an action can be brought in England) depends upon the combined effect of the law of the country where the act is done (*lex loci delicti commissi*) and of the law of England (*lex fori*).

RULE 175. — An act done in a foreign country is a tort if it is *both*

- (1) wrongful according to the law of the country where it was done, *and*
- (2) wrongful according to English law, *i. e.*, is an act which, if done in England, would be a tort.

RULE 176. — An act done in a foreign country is not a tort if it is not *both*

- (1) wrongful according to the law of the country where it was done, *and*
- (2) wrongful according to English law.

SUB-RULE. — An act done in a foreign country which, though wrongful under the law of that country at the moment when it was done, has since that time been the subject of an Act of Indemnity passed by the legislature of such country, is not a tort.

CHAPTER XXVIII.

ADMINISTRATION IN BANKRUPTCY.

RULE 177. — The administration in bankruptcy of the property of a bankrupt which has passed to the trustee is governed by the law of the country where the bankruptcy proceedings take place (*lex fori*).

CHAPTER XXIX.

ADMINISTRATION AND DISTRIBUTION OF
DECEASED'S MOVABLES.

(A) ADMINISTRATION.

RULE 178. — The administration of a deceased person's movables is governed wholly by the law of the country where the administrator acts, and from which he derives his authority to collect them, *i. e.*, in effect, by the law of the country where the administration takes place (*lex fori*).

Such administration is not affected by the domicile of the deceased.

In this Rule, the term "administration" does not include distribution.

(B) DISTRIBUTION.

RULE 179. — The distribution of the distributable residue of the movables of the deceased is (in general) governed by the law of the deceased's domicile (*lex domicilii*) at the time of his death.

CHAPTER XXX.

SUCCESSION TO MOVABLES.

(A) INTESTATE SUCCESSION.

RULE 180. — The succession to the movables of an in-

testate is governed by the law of his domicile at the time of his death, without any reference to the law of the country where

- (1) he was born, or
- (2) he died, or
- (3) he had his domicile of origin, or
- (4) the movables are, in fact, situate at the time of his death.

(B) TESTAMENTARY SUCCESSION.

(i) *Validity of Will.*

RULE 181. — Any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid.

(ii) *Invalidity of Will.*

RULE 182. — Any will of movables which is invalid according to the law of the testator's domicile at the time of his death on account of

- (1) the testamentary incapacity of the testator, or
 - (2) the formal invalidity of the will (*i. e.*, the want of the formalities required by such law), or
 - (3) the material invalidity of the will (*i. e.*, on account of its provisions being contrary to such law),
- is (subject to the exceptions hereinafter mentioned, and to the effect of Rule 184) invalid.

Exception 1. — Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either

- [1] by the law of the place where the same was made, or
- [2] by the law of the place where such person was domiciled when the same was made, or
- [3] by the laws then in force in that part [if any] of Her Majesty's dominions where the testator had his domicile of origin.

Exception 2. — Every will and other testamentary instrument made within the

United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

SUB-RULE. — The law of a deceased person's domicile at the time of his death, in general, determines whether, as to his movables, he does or does not die intestate.

(iii) *Interpretation of Will.*

RULE 183. — Subject to the exception hereinafter mentioned, a will of movables is (in general) to be interpreted with reference to the law of the testator's domicile at the time when the will is made.

Exception. — Where a will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will should be construed with reference to the law of that country.

(iv) *Effect of Change of Testator's Domicil after Execution of Will.*

RULE 184. — [Subject to the possible exception hereinafter mentioned] no will or other testamentary instrument shall be held to have been revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

Exception. — A will which is invalid on account of material invalidity according to the law of the testator's domicile at the time of his death is invalid, although it may have been valid according to the law of the testator's domicile at the time of its execution (?).

(C) *EXECUTION OF POWER BY WILL.*

Capacity.

RULE 185. — A person may have capacity to exercise by will a power of appointment conferred by an English instru-

ment, though he does not possess testamentary capacity under the law of his domicil.

The term "English instrument" in this Rule and in the following Rules means an instrument (*e. g.*, a settlement or a will) which creates a power of appointment and operates under English law.

Validity.

RULE 186.— A will of movables made in exercise of a power of appointment conferred by an English instrument is entitled to be admitted to probate, and is, as far as form is concerned, a good execution of the power where the will

(1) is executed in accordance with the terms of the power as to execution, *and*

(2) complies with any of the following conditions as to form (that is to say)—

(i) where the will is executed in accordance with the form required by the ordinary testamentary law of England (*i. e.*, if the will be made after the end of 1837), by the Wills Act, 1837; or

(ii) where the will is executed in accordance with the form required by the law of the testator's (donee's) domicil; or

(iii) where the will is executed in accordance with any form which is valid under the Wills Act, 1861, *i. e.*, where the will is valid either under Exception 1, or Exception 2, to Rule 182, or under Rule 184.

RULE 187.— Subject to the exception hereinafter mentioned, no will which does not satisfy the requirements of Rule 186 is a valid execution of a power of appointment by will conferred by an English instrument.

Exception.— A will executed in accordance with the form required by the Wills Act, 1837, is, so far as regards the execution and attestation thereof, a valid execution of a power of appointment by will, notwithstanding that it shall have been expressly required, under the instrument creating the power, that a will made in exercise of such power should be exercised with some additional, or other, form of execution or solemnity.

CHAPTER XXXI.

PROCEDURE.

RULE 188.— All matters of procedure are governed wholly by the local or territorial law of the country to which a Court wherein an action is brought or other legal proceeding is taken belongs (*lex fori*).

In this Digest, the term “procedure” is to be taken in its widest sense, and includes (*inter alia*) —

- (1) remedies and process ;
- (2) evidence ;
- (3) limitation of an action or other proceeding ;
- (4) set-off or counter-claim.



INTRODUCTION.

My purpose in this introduction, which forms an integral part of this work, is to deal with three topics: first, the nature of the subject treated of in this Digest, and generally included under the title of the conflict of laws or of private international law; secondly, the proper method for the treatment of this subject; and thirdly, the general principles underlying the rules or maxims which collectively make up this branch of law.

I. NATURE OF THE SUBJECT.

Most of the cases which occupy an English Court are in every respect of a purely English character; the parties are Englishmen, and the cause of action arises wholly in England, as where *A*, a London tradesman, sues *X*, a citizen of London, for the price of goods sold and delivered in London. When this is so, every act done, or alleged to be done, by either of the parties clearly depends for its legal character on the ordinary rules of English law.

Cases, however, frequently come before our Courts which contain some foreign element; the parties, one or both of them, may be of foreign nationality, as where an Italian sues a Frenchman for the price of goods sold and delivered at Liverpool; the cause of action, or ground of defence, may depend upon transactions taking place wholly or in part in a foreign country; as where *A* sues *X* for an assault at Paris, or on a contract made in France and broken in England, or where *X* pleads in his defence a discharge under the French bankruptcy law; the transactions, lastly, in question, though taking place wholly in England, may, in some way, have reference to the law or customs of a foreign country; this is so, for instance, when *A* wishes to enforce the trusts of a marriage settlement executed in England, but which on the face of it, or by implication, refers to French or Italian law.

Whenever a case containing any foreign element calls for decision, the judge before whom it is tried must, either expressly or tacitly, find an answer to, at least, two preliminary questions.

FIRST QUESTION.—Is the case before him one which any English Court has, according to the law of England, a right to determine? ¹

¹ See chapters iv. to x., *post*.

The primary business of English tribunals is to adjudicate on transactions taking place in England between Englishmen, or at any rate between persons resident in England ; or, briefly, to decide English disputes. There clearly may be matters taking place in a foreign country, or between foreigners, with which no English Court has, according to the law of England, any concern whatever ; thus no Division of the High Court, and *a fortiori* no other English tribunal, will entertain an action for the recovery¹ of land in any other country than England. When, therefore, a case coming before an English judge contains a foreign element, he must tacitly or expressly determine whether it is one on which he has a right to adjudicate. This first question is a question of jurisdiction (*forum*).

SECOND QUESTION. — What (assuming the question of jurisdiction to be answered affirmatively) is the body of law with reference to which the rights of the parties are according to the principles of the law of England to be determined ?²

Is the judge, that is to say, to apply to the matter in dispute (*e. g.*, the right of *A* to obtain damages from *X* for an assault at Paris) the ordinary rules of English law applicable to like transactions taking place between Englishmen in England, or must he, because of the "foreign element" in the case, apply to its decision the rules of some foreign law, *e. g.*, the provisions of French law as to assaults ?

This second question is an inquiry not as to jurisdiction, but as to the choice of law (*lex*).³

Each of these inquiries, be it noted, must be answered by any judge, English or foreign, in accordance with definite principles,

¹ *Companhia de Mocambique v. British South Africa Co.* [1892] 2 Q. B. (C. A.) 358.

² See chapters xviii. to xxxi., *post*.

³ The two foregoing questions always require an answer whenever a case contains any foreign element. It is possible that the judge may be called upon to answer a third question, which, however, arises only where one of the parties bases his claim, or defence, upon the decision of a foreign Court, or, in technical language, upon a foreign judgment. See chapters xi. to xvii., *post*.

The question which then arises and forms the third possible preliminary inquiry may be thus stated : Is the case one with which, according to the principles upheld by English Courts, the foreign Court delivering the judgment had a right to deal ?

This again is a question of jurisdiction.

For the sake of simplicity it will be well for the moment to leave this third and occasional inquiry as much as possible out of sight, and to confine our attention to the two questions which, whenever a case containing any foreign element comes before an English judge, necessarily demand an answer.

and, by an English judge, sitting in an English Court, in accordance with principles or rules to be found in the law of England. These rules make up that department of English law which deals with the conflict of laws, and may be provisionally described as principles of the law of England, governing the extra-territorial operation of law or recognition of rights.¹ This branch of English law is as much part of the law of England as the Statute of Frauds, or the Statute of Distributions. The subject, however, with which we are dealing is, partly from ambiguity of language, and partly from other causes, involved in so much obscurity of its own that we may well examine somewhat further into the nature of our topic, and look at the matter from a somewhat different point of view from the side whence we have hitherto regarded it.

The law of every country, as for example of England, consists of all the principles, rules, or maxims enforced by the Courts of that country under the authority of the state.

It makes no difference for our present purpose, whether these principles be written or unwritten; whether they be expressed in Acts of Parliament, or exist as customs; whether they are the result of direct legislation, or are created by judicial decisions. Any rule or maxim whatsoever, which, when the proper occasion arises, will be enforced by the Courts of England under the authority of the state, is part of the law of England. Thus the rule that land descends to the heir, derived as it is from the Common Law; the rule that personal property goes to the next of kin, depending as it now does upon the Statute of Distributions; the principle that a simple contract is not valid without a consideration; or the doctrine, created as it is by judicial legislation, that the validity of a marriage ceremony, wherever made, depends on the law of the country where the marriage is celebrated, are each of them, however different in character and origin, rules enforced by English Courts, and therefore each of them both laws and part of the law of England.

The law of England, however, taken in its most extended and most proper sense, may, in common with the law of every civilised country, *e. g.*, of Italy or of France, be divided into two branches.

The first branch of the law of England may be described, if not with absolute precision, yet with sufficient accuracy for our present object, as the body of rules which regulate the rights of

¹ The expression "extra-territorial recognition of rights" as a description of the branch of law known as private international law was first employed by Professor Holland. See *Holland, Jurisprudence* (7th ed.), p. 370. See also p. 15, *post*.

the inhabitants of England and determine the legal effect of transactions taking place between Englishmen within the limits of England. Indirectly, indeed, these rules may, under certain circumstances, affect transactions taking place abroad; their direct and immediate effect, however, is to regulate the actions of men and women living in England. They may, therefore, for the sake of distinction from the other branch or portion of English law, be called the "territorial" or "local" law of England. This territorial law constitutes indeed so much the oldest and most important part of English law, that it has been constantly taken to be, and treated as, the whole of the law of the land. Blackstone's Commentaries, for example, though written with the avowed object of describing the whole of the "law of England," contain no mention of any rules which do not belong to the territorial or local law. With this branch of the law, important though it be, the writer on the conflict of laws has no direct concern.

The second branch of the law of England consists of rules which do not directly determine the rights or liabilities of particular persons, but which determine the limits of the jurisdiction to be exercised by the English Courts taken as a whole, and also the choice of the body of law, whether the territorial law of England or the law of any foreign country, by reference to which English Courts are to determine the different matters brought before them for decision.

These rules about jurisdiction and about the choice of law, which make up the second branch of the law of England, are directions for the guidance of the judges.

As to purely English transactions no such guidance can be needed. English Courts clearly have jurisdiction in respect of matters taking place within this country, for to determine the legal effect of such matters is the very object for which the Courts are constituted. The legal character, again, of acts done in England by Englishmen must obviously be determined by reference to the territorial law of England, since the very object for which this law is created is to regulate the actions of Englishmen in England.

The rules therefore in question, since they are inapplicable to purely English transactions, must have reference to cases which contain, or may contain, some foreign element. They are, in fact, directions for the guidance of the judges when called upon to deal with transactions which, either because of the foreign character of one, or of both, of the parties, or because something material to the case has been done, or is intended to be done, in a foreign

country, or has been done with reference to some foreign law, may, possibly at least, require for their fair determination, reference to the provisions of some foreign law. If, for the sake of convenience, we dismiss for the moment from our attention all questions of jurisdiction, this second branch of the law of England may be described in the following terms. It is that part of the law of England which provides directions for the judges when called upon to adjudicate upon any question in which the rights of foreigners, or the effect of acts done, or to be done, in a foreign country, or with reference to a foreign law, require determination. These directions determine whether a given class of cases (*e. g.*, cases as to contracts made in foreign countries) must be decided wholly by reference to the territorial law of England, or either wholly, or in part, by reference to the law of some foreign country, *e. g.*, France. Since these directions for the choice of law may provide either that the territorial law of England shall, under certain circumstances, govern acts taking place abroad, *e. g.*, the proper execution of a will made in France by a testator domiciled in England, or that foreign law shall, under certain circumstances, govern acts done in England, *e. g.*, the proper execution of a will made in England by a testator domiciled in France, they may, as has been already intimated, be described as "rules for determining the extra-territorial operation of law," or better, "the extra-territorial recognition of rights,"¹ and the branch of law with which we are concerned is, if we include within it both rules as to jurisdiction and rules as to the choice of law, nothing else than the subject generally treated of by English and American writers under the title Conflict of Laws, and by Continental authors under the title of Private International Law.

A mastery of this twofold division of the law of England (or for that matter of any civilised country) puts a student on his guard against an ambiguity of language which, unless clearly perceived, introduces confusion into every discussion concerning the conflict of laws.

The term "law of a given country,"² *e. g.*, law of England, or law of France, is an expression which, under different forms, necessarily recurs again and again in every treatise on private international law. It is further an expression which appears to be perfectly intelligible, and therefore not to demand any explanation. Yet, like many other current phrases, it is ambiguous. For the term "law of a given country" has, at least, two meanings. It

¹ See *Holland, Jurisprudence* (7th ed.), p. 370.

² See chap. i., *post*.

may mean, and this is its most proper sense, every rule enforced by the Courts of that country. It may mean, on the other hand, and this is a very usual sense, that part of the rules enforced by the Courts of a given country which makes up the "local" or "territorial" law of a country. To express the same thing in a different form, the term "law of a country" may be used as either including the rules for the choice of law, or as excluding such rules and including only those rules or laws which, as they refer to transactions taking place among the inhabitants of a country within the limits thereof, I have called local or territorial law.

This ambiguity may be best understood by following out its application to the expression "law of England."

The term "law of England" may, on the one hand, mean every rule or maxim enforced or recognised by the English Courts, including the rules or directions followed by English judges as to the limits of jurisdiction and as to the choice of law. This is the sense in which the expression is used in the absolutely true statement that "every case which comes before an English Court must be decided in accordance with the law of England." The term "law of England" may, on the other hand, mean, not the whole of the law of England, but the local or territorial law of England excluding the rules or directions followed by English judges as to the limits of jurisdiction or as to the choice of law. This is the sense in which the expression is used in the also absolutely true statements that "the validity of a will executed in England by a Frenchman domiciled in France is determined by English judges not in accordance with the law of England but in accordance with the law of France," or that "a will of freehold lands in England, though executed by a foreigner abroad, will not be valid unless executed in conformity with the law of England," *i. e.*, with the provision of the Wills Act, 1837.

Hence the assertion that "while all cases which come for decision before an English Court must be decided in accordance with the law of England, yet many such cases are, and must be, decided in accordance, not with the law of England, but with the law of a foreign country, *e. g.*, France," though it sound paradoxical, or self-contradictory, is strictly true. The apparent contradiction is removed when we observe that in the two parts of the foregoing statement the term law of England is used in two different senses: in the earlier portion it means the whole law of England, in the latter it means the territorial law of England. This ambiguity is made plain to any one who weighs the meaning

of the well-known dictum of Lord Stowell with regard to the law regulating the validity of a marriage celebrated in a foreign country. The question, it is therein laid down, "being entertained in "an English Court, it must be adjudicated according to the principles of English law, applicable to such a case. But the only "principle applicable to such a case by the laws of England is, "that the validity of Miss Gordon's marriage rights must be "tried by reference to the law of the country, where, if they exist "at all, they had their origin. Having furnished this principle, "the law of England withdraws altogether, and leaves the legal "question to the exclusive judgment of the law of Scotland."¹

Let it further be borne in mind that the ambiguity affecting the term law of England affects the term law of France, law of Italy, and the like, and that with regard to statements where these terms are used, the reader should always carefully consider whether the expression is intended to include or to exclude the rules followed by the Courts of the given country, *e. g.*, France, as to the choice of law.²

The general character of our subject being then understood, there remain several subordinate points which deserve consideration.

First. The branch of law containing rules for the selection of law is in England, as elsewhere, of later growth than the territorial law of the land.

The development of rules about the conflict of law implies both the existence of different countries governed by different laws, — a condition of things which hardly existed when the law of Rome was the law of the civilised world, — and also the existence of peaceful and commercial intercourse between independent countries, — a condition of things which had no continuous existence during the ages of mediæval barbarism.

It was not, therefore, until the development of something like the state of society now existing in modern Europe that questions about the conflict of laws powerfully arrested the attention of lawyers. It is a fact of great significance that the countries where attention was first paid to this branch of law, and where it has been studied with the greatest care, have been countries such as Holland, Germany, Great Britain, or the United States, composed of communities, which, though governed under different laws, have

¹ *Dalrymple v. Dalrymple*, 1811, 2 Hagg. Const. 54, 58, 59, per Lord Stowell, then Sir William Scott.

² See 1 *Williams, Executors* (9th ed.), p. 304, for a good statement of this ambiguity with reference to the expression "law of a deceased person's domicile."

been united by the force either of law or of sentiment into something like one state or confederacy. States of this description, such for example as the United Netherlands, both felt sooner than others the need for giving extra-territorial effect to local laws, and also found less difficulty than did other countries in meeting this necessity; since the local laws which the Courts applied were not in strictness foreign laws, but, from one point of view, laws prevailing in different parts of one state. In this matter the history of France supplies one of these instructive exceptions which prove the rule. France was never a confederacy, but the provinces of the monarchy were governed by different laws. Hence the call for determining the extra-provincial effect of customs raised judicial problems about the choice of law. It is also noteworthy that few English decisions bearing on our subject are of earlier date than the Union with Scotland. None are known to me earlier than the accession of James I.

Secondly. The growth of rules for the choice of law is the necessary result of the peaceful existence of independent nations combined with the prevalence of commercial intercourse. From the moment that these conditions are realised, the judges of every country are compelled by considerations of the most obvious convenience to exercise a choice of law, or, in other words, to apply foreign laws. That this is so may be seen from an examination of the only courses which, when a case involving any foreign element calls for decision, are, even conceivably, open to the Courts of any country forming part of the society of civilised nations.

The necessity for choosing between the application of different laws might conceivably be avoided by rigid adherence to one of two principles.

The Courts of any country, *e. g.*, of England, might, on the one hand, decline to give any decision on cases involving any foreign element, *i. e.*, cases either to which a foreigner was a party, or which were connected with any transaction taking place wholly, or in part, beyond the limits of England.

No need for a choice of law would then arise, for the Courts would in effect decline to decide any question not clearly governed by the territorial law of England. This course of action would, however, exclude Englishmen no less than foreigners from recourse to English tribunals. For an Englishman who had entered into a contract with a Scotchman at Edinburgh, or with a Frenchman at Paris, would, if the principle suggested were rigidly carried out, be unable to bring an action in the English Courts for a breach of the contract. To which it may be added that, were the

same principle adopted by the Courts of other countries, neither party to such a contract would have any remedy anywhere for its breach.

The English Courts might, on the other hand, determine to decide every matter brought before them, whatever the cause of action and wherever it arose, solely with reference to the local law of England, and hence determine the effect of things done in Scotland or in France, exactly as they would do if the transactions had taken place between Englishmen in England.

Difficulties about the choice of law would, by the adoption of this principle, be undoubtedly removed, since the sole rule of selection would be, that the territorial law of England must in all cases be selected, or, in other words, that there must be no choice at all. Gross injustice would, however, inevitably result as well to Englishmen as to foreigners. The object of a legal decision or judgment is to enforce existing rights, or give compensation for the breach thereof, and it is not the object of a legal decision or judgment to create new rights, except in so far as such creation may be necessary for the enforcement or protection of rights already in existence. But to determine the legal effect of acts done in Scotland or in France, *e. g.*, of a contract made between Scotchmen in Edinburgh, solely with reference to the local law of England, would be to confer upon one or other of the parties, or perhaps upon both, new rights quite different from those acquired under the agreement, or, in other words, to fail in the very object which it is sought to attain by means of a judgment. That this is so becomes even more manifest if we place before our minds a case of which the foreign element consists in the fact that two persons have intended in some transaction to regulate their rights by reference to a foreign law. *A* and *X*, Englishmen, living in England, agree in London that certain property shall be settled, as far as English law allows, in accordance with the rules of French law. If in interpreting the settlement an English judge were to decline to take any notice of the law of France, he would clearly fail in carrying out the intention of the parties, or, in other words, would fail in ensuring to either of them his rights under the settlement.

If, therefore, it is impossible for the Courts of any country, without injustice and damage to natives, no less than to foreigners, either to decline all jurisdiction in respect of foreign transactions, or to apply to such transactions no rules except those of the local law, a consequence follows which has hardly been sufficiently noted. It is this: that the Courts of every civilised country are

constrained, not only by logical, but by practical necessity, to concern themselves with the choice of law, and must occasionally give extra-territorial effect now to their own local law, now to the law of some foreign state.

Is, or is not the enforcement of foreign law a matter of "comity"? This is an inquiry which has greatly exercised the minds of jurists. We can now see that the disputes to which it has given rise are little better than examples of idle logomachy. If the assertion that the recognition or enforcement of foreign law depends upon comity means only that the law of no country can have effect as law beyond the territory of the sovereign by whom it was imposed, unless by permission of the state where it is allowed to operate, the statement expresses, though obscurely, a real and important fact. If, on the other hand, the assertion that the recognition or enforcement of foreign laws depends upon comity is meant to imply that, to take a concrete case, when English judges apply French law, they do so out of courtesy to the French Republic, then the term comity is used to cover a view which, if really held by any serious thinker, affords a singular specimen of confusion of thought produced by laxity of language.

The application of foreign law is not a matter of caprice or option, it does not arise from the desire of the sovereign of England, or of any other sovereign, to show courtesy to other states. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners. It were well too in this matter to give heed to two observations. The first is that the Courts, *e. g.*, of England, never in strictness enforce foreign law; when they are said to do so, they enforce not foreign laws, but rights acquired under foreign laws. The second observation is, that disputes about the effect of comity — and the remark applies to other controversies about the conflict of laws — have been confused by mixing together the question what, on a given subject, is the rule, or, in other words, the law which will be enforced by the judges, with the different inquiry, what are the motives which have led judges or legislators to adopt a particular rule as law. Assume, for the sake of argument, the truth of the doctrine that the enforcement of foreign laws depends upon comity. This dogma throws no light whatever on the nature of the rules upheld by English or other Courts as to the enforcement of foreign laws. To know, for example, that the Courts are influenced by considerations of comity is no guide to any one who attempts to answer the inquiry whether the tribunals of a given country

accept "domicil," as do English Courts, or "nationality," as do Italian Courts, as determining the law which affects the validity of a will.

Thirdly. Though the rules as to extra-territorial effect of law enforced by our Courts are part of the law of England, it should be noted that the law of every other civilised country, *e. g.*, of France, of Italy, or of Germany, contains rules for the choice of law, not indeed identical with, but very similar to, the rules for the same purpose to be found in the law of England.

That this should be so is natural. In any given case the laws among which a choice may rationally be made are limited in number.¹ The selection of one or more of these laws is not a matter of caprice, but depends upon more or less definite reasons which are likely to influence all Courts and legislators. The grounds, for example, which induce the Courts of England to determine the formal validity of a contract, by the law of the place where it is made, are likely to weigh with the Courts of France or of Germany. There exists, moreover, a palpable convenience in the adoption by different countries of the same principle for the choice of law. Hence the mere fact that a particular rule for the selection of law has been followed by the French and American Courts is a valid though not absolutely decisive reason in favour of its being adopted by English Courts; and an appreciation of the advantages to be derived from uniformity has undoubtedly influenced both Courts and legislatures, when called upon to determine in a given class of cases what should be the rule as to the extra-territorial effect of law. Thus has come into existence a body of rules which, though in different countries they exist as laws only by virtue of the law of each particular country, and though they are by no means everywhere identical, exhibit wherever they exist marked features of similarity. This likeness is increased by the fact that the object aimed at by the Courts of different countries, in the adoption of rules as to the extra-territorial effect of law, is everywhere in substance one and the same.

¹ They may be reduced to five heads: (1) *Lex personalis*, or "the law of the country to which a person belongs," either (a) by domicil (*lex domicilii*) or (b) by nationality (*lex ligentiae*); (2) *lex actus*, or "the law of the country where a legal act takes place," of which the *lex loci contractus*, or the law of the place where a contract is made, is a subdivision; (3) *lex loci delicti*, or "the law of the country where a wrong is committed;" (4) *lex loci solutionis*, or "the law of the country where a legal act (payment) is to be performed," and (5) *lex fori*, or "the law of the country to which a Court belongs in which an action is brought, or other legal proceeding (*e. g.*, administration in bankruptcy) takes place." Compare *Holland, Jurisprudence* (7th ed.), pp. 362, 363.

This aim is, in the main, to secure the extra-territorial effect of rights. All, or nearly all, the rules as to the choice of law, which are adopted by different civilised countries, are provisions for applying the principle that rights duly acquired under the law of one country shall be recognised in every country. Thus the law of England and the law of France seek in this respect the same object, viz., the securing that the rights which a man has attained by marriage, by purchase, or otherwise, *e. g.*, in Italy, shall be enforceable and enjoyable by him in England or France, and, conversely, that the rights which he has acquired in England may be enforceable and enjoyable by him in Italy. This community of the aim, pursued by the Courts and legislatures of different countries, lies at the very foundation of our subject. It is of itself almost enough to explain the great similarity between the rules as to the choice of law adopted by different countries.

Fourthly. The department of law, whereof we have been considering the nature, has been called by various names, none of which are free from objection.¹

By many American writers, and notably by Story, it has been designated as the "conflict of laws." The apparent appropriateness of the name may be best seen from an example of the kind of case in which a "conflict" is supposed to arise. *H* and *W*, Portuguese subjects, are first cousins. By the law of Portugal they are legally incapable of intermarriage. They come to England and there marry each other in accordance with the formalities required by the English Marriage Acts. Our Courts are called upon to pronounce upon the validity of the marriage. If the law of England be the test the marriage is valid; if the law of Portugal be the test the marriage is invalid. The question at issue, it may be said, is, whether the law of England or the law of Portugal is to prevail. Here we have a conflict, and the branch of law which contains rules for determining it may be said to deal with the conflict of laws, and be for brevity's sake called by that title.

The defect, however, of the name is that the supposed "conflict" is fictitious and never really takes place. If English tribunals decide the matter in hand, with reference to the law of Portugal, they take this course not because Portuguese law vanquishes English law, but because it is a principle of the law of England that, under certain circumstances, marriages between Portuguese subjects shall depend for their validity on conformity

¹ See *Holland, Jurisprudence* (7th ed.), pp. 365-369, for an account of the various names applied to rules for determining the choice of law.

with the law of Portugal. Any such expression, moreover, as "conflict," or "collision," of laws, has the further radical defect of concealing from view the circumstance that the question by the law of what country a given transaction shall be governed, is often a matter too plain to admit of doubt. No judge probably ever doubted that the validity of a contract for the purchase and sale of goods between French subjects made at Paris, and performed, or intended to be performed, in France, depends upon the rules of French law. The term conflict of laws has been defended on the ground of its applicability, not to any collision between the laws themselves, but to a conflict in the mind of a judge on the question which of two systems of law should govern a given case. This suggestion gives, however, a forced and new sense to a received expression. It also amounts simply to a plea that the term conflict of laws may be used as an inaccurate equivalent for the far less objectionable phrase choice of law.

Modern authors, and notably Mr. Westlake, have named our subject Private International Law.

This expression is handy and manageable. It brings into light the great and increasing harmony between the rules as to the application of foreign law which prevails in all civilised countries, such as England, France, and Italy. The tribunals of different countries, as already pointed out, follow similar principles in determining what is the law applicable to a given case, and aim at the same result, namely, the recognition in every civilised country of rights acquired under the law of any other country. Hence an action brought to enforce a right acquired under the law of one country (*e. g.*, of France) will in general be decided in the same manner in whatever country it be maintained, whether, that is to say, it be brought in the Courts of England or of Germany. On this fact is based the defence of the name Private International Law. The rules, it may further be said, which the words designate, affect the rights of individuals as against one another, and therefore belong to the sphere of "private," not of public law; and these rules, as they constitute a body of principles common to all civilised countries, may be rightly termed "international."

The term, however, is at bottom inaccurate. The words private international law "should mean, in accordance with that use of the word 'international' which, besides being well established in ordinary language, is both scientifically convenient and etymologically correct, 'a private species of the body of rules which prevails between one nation and another.' Nothing of the sort is, however, intended; and the unfortunate employ-

"ment of the phrase, as indicating the principles which govern the choice of the system of private law applicable to a given class of facts, has led to endless misconception of the true nature of this department of legal science."¹ Nor does the inaccuracy of the term end here. It confounds two classes of rules, which are generically different from each other. The principles of international law, properly so called, are truly "international" because they prevail between or among nations; but they are not in the proper sense of the term "laws," for they are not commands proceeding from any sovereign. On the other hand, the principles of private international law are "laws" in the strictest sense of that term, for they are commands proceeding from the sovereign of a given state, *e. g.*, England or Italy, in which they prevail; but they are not "international," for they are laws which determine the private rights of one individual as against another, and these individuals may, or may not, belong to one and the same nation. Authors, in short, who like Felix divide international law into public international law and private international law, use the words international and law in each of these expressions in a different sense. Such ambiguity of language, unless fully acknowledged, must lead, as it has led, to confusion of thought. Nor is much gained by such an amendment of terminology as is achieved by a transposition of words. The expression "international private law"² is no doubt a slight improvement on private international law, as it points out that the rules which the name denotes belong to the domain of private law. But the name, improve it as you will, has the insuperable fault of giving to the adjective international a meaning different from the sense in which it is generally and correctly employed.

Other names for our subject, such as "comity," the "local limits of law," "intermunicipal law," and the like, have not obtained sufficient currency to require elaborate criticism. Their fault is, that either they are too vague for the designation of the topic to which they are applied, or else they suggest notions which are inaccurate. Thus the term "comity," as already pointed out, is open to the charge of implying that a judge, when he applies foreign law to a particular case, does so as a matter of caprice or favour, whilst the term "intermunicipal law" can be accurately used only by giving to each half of the word "intermunicipal" a sense which both is unusual and also demands elaborate explana-

¹ *Holland, Jurisprudence* (7th ed.), p. 369.

² See *Bar, Das Internationale Privat- und Strafrecht*.

tion. A more accurate description of our topic is (it is submitted) "the extra-territorial effect of law," or better, Professor Holland's phrase "the extra-territorial recognition of rights."¹ But such expressions are descriptions, not names. A writer, therefore, called upon to deal with our topic will act wisely in refusing to be tied down to any set form of words. He will, when convenient, use the admittedly inaccurate terms, conflict of laws, or private international law. But he will himself remember, and will attempt to impress upon his readers, that these names are nothing more than convenient marks by which to denote the rules maintained by the Courts of a given country, as to the selection of the system of law which is to be applied to the decision of cases that contain, or may contain, some foreign element, and also the rules maintained by the Courts of a given country, as to the limits of the jurisdiction to be exercised by its own Courts as a whole, or by foreign Courts.

II. METHOD OF TREATMENT.

The subject of the conflict of laws has been treated according to two different methods, which may, for the sake of distinction, be termed respectively the "theoretical method" and the "positive method."

The theoretical method has been adopted by a body of Continental writers, among whom by far the most distinguished is still Savigny. These authors differ from each other on many points of importance, but they display two common characteristics.

Starting from the facts that the rules of private international law which prevail in one country, as for example in England, are to a great extent the same as the rules maintained in other countries, as for example in France or Germany, and that, under the influence of modern civilisation, this similarity tends to increase, they consider private international law as constituting in some sense a "common law," tacitly adopted by all civilised nations. They of course do not deny that whatever force this common law possesses within England, or any other country, is derived from the authority of the sovereign thereof. Nor do they overlook the fact that the legislation or judicial decisions of different states deviate more or less from the principles of the supposed common law. Their doctrine is, that such deviations ought to be avoided, that the

¹ Holland, *Jurisprudence* (7th ed.), p. 370, and *Revue de Droit International*, 1880, p. 581, where he suggested also the term "*Droit privé (ou, selon le cas, pénal) extra-territorial.*"

fundamental principles of private international law can be ascertained by study and reflection, and that the soundness of the rules maintained, say in England, as to the extra-territorial recognition of rights, can be tested by their conformity to, or deviation from, such general principles.

Hence, the next characteristic of the upholders of the theoretical method is agreement in the view, that the object of a writer on the conflict of laws is to discover the principles of this common law of Europe, and, starting from some one principle, as, for example, that we must "discover for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat);"¹ or that "the local law should be always applied by which vested rights are kept intact;"² or that "every legal relation must be judged according to the local law of that territory within which it has *come into existence*,"³ to show how in accordance with the fundamental principle assumed by the writer as the basis of his system, a consistent body of rules is, or might be, adopted by all nations for the determination of the questions proper to private international law. What may be the merit or demerit of the fundamental principles laid down by Savigny and others is, be it noted, not at present in question. What requires our attention is the aim proposed to themselves by the class of authors at whose head stands Savigny. Their object is to construct a logically consistent series of rules, which either actually do agree with the rules as to the choice of law upheld in different states, or ought, consistently with sound theory, to prevail in every state.

Authors who pursue this method pass almost imperceptibly from the question what are, to the different inquiry what ought to be, the principles of private international law. Neither Savigny, for example, nor Bar, professes to give to the readers of his treatise a mere enumeration or explanation of the principles, in reference to the extra-territorial recognition of rights, which are actually upheld by the Courts of one, or of all, the states of Europe. What each author attempts to provide is a statement of the principles which ought, as a matter of consistency and expediency, to guide the judges of every country when called upon to deal with a conflict of laws. In this point of view Bar's criticism on Story is full of instruction. "It will often," he writes, "be difficult

¹ *Savigny, Guthrie's transl.* (2nd ed.) p. 133.

² *Wächter*, ii. pp. 1-9.

³ *Schäffner*, s. 32. Compare *Savigny, Guthrie's transl.* (2nd ed.) pp. 146, 147.

"for a reader to say from Story's discussion of a subject that the decision must, on legal principle, be what he pronounces it to be and none other — (*dass aber die Entscheidung juristisch so und nicht anders ausfallen müsse, wird ihm oft aus Story's Erörterung nicht klar werden*)."¹ The implied censure is just, if Story's aim was to show what ought, on general legal principles, to be the rules governing the conflict of laws. Whether this was his object is questionable. But, be this as it may, Bar's language gives us an accurate conception of the aim pursued by himself and other writers of the same school. They write with a view to show what ought of necessity to be in any given case the rule of private international law.

The advantages of the theoretical mode of treatment, when employed by a man of genius, such as Savigny, are in danger of being underrated by English lawyers, to whose whole conception of law it is at bottom opposed. It is therefore a duty to bring these merits into prominence. The two great merits of the method are, first, that it keeps before the minds of students the agreement between the different countries of Europe as to the principles to be adopted for the choice of law, and next, that it brings into prominence the consideration which English lawyers are apt to forget: that the choice of one system of law rather than of another for the decision of a particular case is dictated by reasons of logic, of convenience, or of justice, and is not a matter in any way of mere fancy or precedent. Whether, for example, the legal effect of a given transaction ought to be tested by the *lex actus*, the *lex domicilii*, or the *lex fori*, is a matter admitting of discussion, and which ought to be discussed on intelligible grounds of principle.

The defects of the *a priori* method are unlikely to escape Englishmen. It is not indeed, be it observed, fairly open to the objection which often suggests itself to English critics, that it takes no account of laws as they actually exist. The method is perfectly consistent with careful investigation into the rules as to the conflict of laws which in fact prevail in given countries, *e. g.*, France or the United States, since the actual practice of the Courts tests the correctness of theoretical speculation.

The true charge against the theoretical method is that it leads the writers who adopt it to treat as being law what they think ought to be law, and to lay down for the guidance of the Courts of every country rules which are not recognised as law in any coun-

¹ Bar (1st German ed.), s. 19. Compare Bar, *Private International Law*, Gillespie's transl. (2nd ed.) p. 47.

try whatever. "The jurists of Continental Europe," writes Story, "have, with uncommon skill and acuteness, endeavoured to collect principles which ought to regulate this subject among all nations. But it is very questionable whether their success has been at all proportionate to their labour; and whether their principles, if universally adopted, would be found either convenient, or desirable, or even just, under all circumstances."¹ This remark exactly hits the weak point of a method which rests on the assumption, common to most German jurists, but hardly to be admitted by an English lawyer, that there exist certain self-evident principles of right whence can be deduced a system of legal rules, the rightness of which will necessarily approve itself to all competent judges.

The positive method is followed by a whole body of authors, among whom Story is the most celebrated.

These writers, though they do not always quite consistently adhere to their own method, treat the rules of private international law in the main as part of the municipal law of any given country, *e. g.*, England or Italy, where they are enforced.

This school starts from the fact that the rules for determining the conflict of laws are themselves "laws" in the strict sense of that term, and that they derive their authority from the support of the sovereign in whose territory they are enforced. Story, therefore, or Fœlix do not practically concern themselves with any common law of Europe, but make it the object of their labours to ascertain what is the law of a given country with regard to the extra-territorial operation of rights. A writer of this class may with perfect consistency either limit his inquiries to the law of one country only, as for instance of England, or may extend his investigations to the ascertainment of the laws (with reference of course to his special topic) of Italy, of France, or of all the countries making up the civilised world. This, it may be added, is the course actually adopted by Fœlix, who, though writing with primary reference to the law of France, also states briefly the rules, with regard to the extra-territorial recognition of rights, to be found in the law of other countries, such as England or Germany. But whatever be the limits imposed on the scope of their inquiries by writers who follow the positive method, the object of their labours is always in character the same. Their aim is to ascertain what are the rules contained in the law of a given country with regard to a special topic, namely, the extra-territorial recognition of rights. Hence it follows that these

¹ Story, *Conflict of Laws*, s. 28.

authors ought not, in so far as they act consistently with their own method, to attempt the deduction of the rules of private international law from certain general and abstract principles, for their aim is to discover not what ought to be, but what *is* the law. Thus the rule of the law of England, that status depends in the main on the law of a person's domicil, and the different rule laid down by the Italian Code, that status depends on the law of a person's state or nation, are not only different from, but in many cases opposed to, each other. Both, therefore, of the rules cannot, it is presumed, be necessary deductions from the same general principle. Nor can both be articles of any common law of Europe. But to writers who follow the positive method, each rule is equally a part of private international law. They are both rules as to the choice of law: the one belongs to the municipal law of England, the other to the municipal law of Italy.

The merit of this mode of treatment is that it constantly impresses upon the minds both of writers and of readers, the truth of the all-important doctrine that no maxim is a law unless it be part of the municipal law of some given country, and that the proper means for ascertaining what is the law, say of England or France, with respect to the so-called "conflict of laws" is to study the statutory enactments and the judicial decisions which embody the law of England or France. The soundness of this method is shown by the consideration that writers of eminence pursue it in practice, even where they do not accept it in theory. Savigny and Bar have throughout their works chiefly in view the laws of Germany, or at any rate of those states whose jurisprudence has been influenced by Roman law. Westlake and Phillimore almost avowedly base their speculative conclusions on English or American judgments. References to the common law of Europe are, even by authors who regard it as in some sense the source of private international law, introduced mainly when, for want of judicial decisions or of statutory enactments, it is necessary to consider how a case ought to be decided which has not in fact occupied the Courts. Under such circumstances, which are not of rare occurrence, a writer is compelled to consider the question what in conformity with certain admitted principles ought to be the law applicable to a supposed case.

Here we touch on the weak side of the positive method.

It keeps in the background the extent to which civilised nations do in reality recognise certain common principles as properly governing the extra-territorial recognition of rights. It conceals further the fact that the number of well-established rules with

regard to the choice of law to be found in the law of England, or of any other country, is small, and that, whenever a case arises falling under no rule prescribed by statute or by judicial precedent, judges must legislate, and do in fact legislate, with an eye to principles which, being adopted in other countries, may, by an allowable fiction, be styled the common law of Europe.

Still, the positive method is, whatever its defects, the mode of treating the rules of private international law which ought to be adopted by any one who endeavours to deal with them as a branch of the law of England. Consistent adherence to this method, whilst it precludes the writer from the examination of several curious and interesting topics, such as the historical problems connected with the growth of private international law, relieves him from the necessity of justifying the maintenance of one rule rather than another as soon as it is ascertained to be part of the law of England. An expositor or commentator is not required to be an apologist. The systematic attempt, however, to state what the law is, is in no way inconsistent with an explanation of the grounds on which a rule rests. The part of the law of England which regulates the extra-territorial recognition of rights is no mere mass of incoherent maxims; it is rather a system of rules, all of which have a relation to each other. In the ascertainment of these rules, there will moreover be found, as I have already intimated, opportunities for the legitimate application of the theoretical method. Whenever, as often happens, neither the Statute Book nor the Reports contain any authoritative direction for the decision of a particular case, or rather of a particular class of cases, an intelligent inquirer must recur to the judgments of foreign Courts, and especially of American tribunals, and to the doctrines of authors such as Story or Savigny, whose opinions have, in fact, moulded the decisions of English judges. Such reference is justified, not by the fictitious authority of any common law of Europe, but by the consideration that English judges, when acting in a legislative capacity, rightly give weight to the opinion of eminent jurists, and are influenced by the wish to make the practice of our Courts correspond, in a matter which concerns all civilised states, with the practice upheld by foreign tribunals.

The adoption of the positive method fixes the path to be followed by an author whose business it is to determine the principles of English law with regard to the extra-territorial recognition of rights. He should pursue, as far as possible, the course adopted by English judges when it is their duty to decide any question which may raise a, so-called, conflict of laws.

They first consider whether the case falls within the terms of any Act of Parliament. If it does, there is no further room for discussion.

Thus, the Foreign Marriage Act, 1892, 55 & 56 Vict. cap. 23, validates marriages between parties, one of whom is a British subject, when celebrated abroad before a British Consul in the manner prescribed by that Act, and the Wills Act, 1861, 24 & 25 Vict. cap. 114, determines the circumstances under which a will of personalty is valid if executed in foreign parts by a British subject. Cases which fall within either of these statutes are, therefore, decided by our Courts solely and simply by reference to these statutes. The possibility or certainty that French tribunals might deny validity to a marriage celebrated in France in accordance with the Foreign Marriage Act, 1892, or that a French or other foreign Court might treat as void a will which nevertheless satisfied the requirements of 24 & 25 Vict. cap. 114, is, as far as our Courts are concerned, an irrelevant consideration. Nor would they pay any attention to the unanimous opinion of jurists that the Foreign Marriage Act, 1892, or the Wills Act, 1861, violated the principles of the common law of Europe.

If a given case does not fall within the terms of an Act of Parliament, the next inquiry for a judge is whether it is covered by any principle to which precedent has given the authority of law. Show the existence of such a principle, and discussion is again closed.

It is now, for example, settled by a series of decisions that the question whether an action on a contract is barred by a statute of limitation must, in an English Court, be determined wholly by reference to the *lex fori*, i. e., the ordinary or territorial law of England. When, therefore, the question is discussed whether the remedy on a foreign contract is barred by lapse of time, our Courts look wholly to the provisions of English statutes of limitations. On the matter referred to, the authority of text-writers and jurists is opposed to the rule established by English decisions. But the rule is now firmly established. It is part of the law of England, and no argument from the authority of Savigny, or of other eminent jurists, would induce an English judge to violate a rule which, were the matter *res integra*, our Courts might hesitate to adopt.

If, lastly, it happen that a case fall neither within the terms of any Act of Parliament, nor under any principle established by authority, English judges (who, under these circumstances, in effect legislate) look for guidance to foreign decisions, to the

opinions of jurists, or to arguments drawn from general principles.

Thus, in a recent case,¹ the question arose whether a man born illegitimate, but legitimated in Holland by the subsequent inter-marriage of his parents, could, under the Statute of Distributions, succeed to the personal property of an uncle dying domiciled in England. The Court of Appeal held in effect that the case was not concluded by the terms of the statute, nor by precedent, and, falling back on general grounds of principle, determined that the legitimacy of the claimant depended on the law of his domicile (Holland) at the time of his birth, and that therefore he was, in England, a "legitimate" child, and entitled to succeed to the goods of his uncle.

The matter may thus be summed up: The sources from which to ascertain the law of England with regard to the extra-territorial recognition of rights, or, in other words, with regard to the rules of private international law, are, first, Acts of Parliament; secondly, authoritative decisions or precedents; thirdly, where recourse can be had neither to statutory enactments nor to reported decisions, then such general principles as may be elicited from the judgments of foreign Courts, the opinions of distinguished jurists, and rules prevalent in other countries.

These are the sources to which the judges refer when called upon to ascertain or fix the law. The only sound method for an English lawyer who attempts to write on private international law as part of the law of England is to follow judicial example and look exclusively to the sources of information recognised by the Courts. This, at any rate, is the method pursued throughout the present treatise.

III. GENERAL PRINCIPLES.

Jurisdiction and Choice of Law.

GENERAL PRINCIPLE No. I. — Any right which has been duly acquired under the law of any civilised country is recognised and, in general, enforced by English Courts, and no right which has not been duly acquired is enforced or, in general, recognised² by English Courts.

¹ *In re Goodman's Trusts*, 1880, 14 Ch. D. 619; 1881, 17 Ch. D. (C. A.) 266.

² This principle must, of course, be understood as limited by the exceptions or limitations contained in Principle No. II.

This proposition is the enunciation of a maxim or the statement of a fact — for it may be considered in either light — which lies at the foundation of the rules for determining the extra-territorial operation of law. Their object and result is to render effective in one country, *e. g.*, England, rights acquired in every other civilised country, *e. g.*, France or Italy. *A*, a Frenchman, marries a Frenchwoman at Paris, and has children by her. He originally acquires under the law of France, but in virtue of the principle we are considering, possesses also in England, the status and the position of a husband and of a father. If again, by sale, gift, descent, or otherwise, he becomes in France the owner of goods which he then brings to England, his rights of ownership obtain acknowledgment here, and he can in an English Court sue any wrongdoer who takes his property away from him. If further, *A* is assaulted by a German in Paris, and, under French law, has a claim to damages for the assault, he can, if he finds the aggressor in England, in general bring an action for the tort¹ in our Courts; and if *A*, instead of suing in England for the wrong, has obtained in a French Court a judgment² against the wrongdoer, he can, speaking generally, enforce his claim to be paid the money due under the judgment against the debtor in England. If, lastly, *A* and *X* have entered into a contract in France, and *X* breaks it, *A* can, if he finds *X* in England, bring an action against him for the breach of contract, and for the damage resulting to *A* therefrom; “where,” in short, “rights are acquired “under the laws of foreign states, the law of this country recognises and gives effect to those rights, unless it is contrary to the “law and policy of this country to do so,”³ *i. e.*, unless the case falls within General Principle No. II.⁴

To illustrate further, or perhaps to illustrate at all, the application of a principle which is universally recognised may seem to lawyers superfluous. “I confess,” says Lord Halsbury in a recent case,⁵ “I have been somewhat surprised at the lengthy “elaboration of principles which I should have thought by this “time had been so far accepted as part of the English law that it “was not necessary to enter into so elaborate a consideration of “them. That one country will, under some circumstances, enforce “contracts made in another, is a proposition I should have thought

¹ See chap. xxvii., *post*.

² See chap. xvi., *post*.

³ *Hooper v. Gumm*, 1867, L. R. 2 Ch. 282, 289, judgment of *Turner*, L. J.

⁴ See p. 32, *post*.

⁵ *In re Missouri Steamship Co.* 1889, 42 Ch. D. (C. A.) 321, at p. 335, per Lord Halsbury, L. C.

"not requiring authority;" and the Chancellor's dictum applies, in principle, not only to the enforcement of a contract made abroad, but also to the enforcement of any right acquired in a foreign country. To laymen, on the other hand, no amount of examples, which could conveniently be given, would convey an adequate conception of the frequency with which English Courts, as a matter of course and of every-day practice, acknowledge the existence of, and enforce, rights acquired whether by foreigners or Englishmen, under the laws of foreign countries. The recognition of rights acquired under foreign laws is a leading principle of modern civilisation; it has, however, received its full development only within comparatively recent times. For the whole branch of law with which we are concerned has, in England at least, come into existence within little more than a century. Hence the principle of the general recognition of acquired rights will not be found laid down in any of our older legal treatises, and it is now far more often tacitly assumed than expressly acknowledged as the foundation of judicial decisions. It is therefore a principle which requires very careful study, and there is little exaggeration in the assertion that, for the proper understanding of any sound theory as to the conflict of laws, every word of the proposition embodying the principle of the extra-territorial recognition of rights deserves attention.

(1) *Right*.—English judges, and the same thing holds good of, for instance, French or German judges, never in strictness enforce the law of any country but their own. Upon the occasions on which they are popularly said to enforce a foreign law, what they do, in reality, is, as already pointed out,¹ to enforce not a foreign law, but a right acquired under the law of a foreign country. This distinction may appear at first sight a useless subtlety, but due attention to it removes difficulties which have perplexed both text-writers and Courts. At least half of the perplexities which have obscured the treatment by jurists of the law as to the enforcement of foreign judgments arise from the failure to appreciate this distinction. Thus it has been thought an anomaly that the Courts of one country, *e. g.*, England, should enforce the judgments given by the Courts of another country, *e. g.*, Italy, or, in other words, that tribunals acting under the authority of the Queen of England should enforce the commands of the King of Italy. What has not been noticed is that when *A* brings in England an action against *X* on an Italian judgment, our Courts are called upon to enforce not the judgment of the Italian Court, *i. e.*, the command

¹ See p. 10, *ante*.

of the King of Italy, but the right acquired by *A* under an Italian judgment to the payment of a debt by *X*. The enforcement of such a claim is neither more nor less anomalous than the enforcement by English tribunals of any other right arising under the law of a foreign country. For whether *A* claims from *X* the payment of a debt due under a contract, made and broken in Italy, or whether he claims the payment of money found by an Italian Court to be due from *X* to *A* for such breach of contract, he in either case demands in reality that an English Court should give effect to a right acquired by *A* under Italian law. Once admit the principle that English Courts in general recognise and enforce rights acquired under the law of a foreign country, and it becomes apparent that there is nothing anomalous or exceptional in their enforcement of a right, *e. g.*, to the payment of £20, acquired under a foreign judgment. The real point, we may observe in passing, which does require explanation is, not the recognition of rights acquired under a foreign judgment, but the fact that, even in the absence of fraud and the like, English Courts, in common with the tribunals of other countries, hold that rights may be acquired under some foreign judgments without having any claim to recognition. It is, in short, not the habitual recognition, but the occasional non-recognition, of rights acquired under foreign judgments which is, apparently at least, anomalous, and therefore needs explanation.¹

(2) *Acquired*.—The object for which Courts exist is to give redress for the infringement of rights. No Court intends to confer upon a plaintiff new rights, except in so far as new rights may be necessary to compensate for, or possibly to guard against, the infringement of an existing right. The basis of a plaintiff's claim is that, at the moment of his coming into Court, he possesses some right, *e. g.*, a right to the payment of £20, which has been violated; the bringing of an action implies, in short, the existence of a right of action. When, therefore, *A* applies to an English Court to enforce a right acquired in France, he must in general show that, at the moment of bringing his action, he possesses a right which is actually acquired under French law, and which he could enforce against the defendant if he sued the defendant in a French Court. *A* complains, for example, of the non-payment of a debt contracted by *X* in Paris, or seeks damages for an assault committed on him by *X* in Paris. To bring himself within the principle we are considering, he must show that his right to payment or to damages is actually acquired.

¹ As to this see p. 28, *post*.

He must show that the debt is due under French law, or that the assault is an offence punishable by French tribunals. English law does not, speaking generally, apply to transactions occurring out of England; hence the foundation of *A*'s claim is that he wishes to enforce rights actually obtained in France, and he will, as a rule, fail to make out his case unless he can show that the grievance of which he complains is recognised as such by French law, or, in other words, unless he can show a right to redress recognised by the law of France.¹

Whether such a right actually exists, *i. e.*, whether *A* has an "acquired right," is a matter of fact depending upon the law of France and upon the circumstances of the case.

(3) *Duly*. — The word "duly" is emphatic. It fixes in effect the limit to the application of General Principle No. I. This principle is not that all rights in fact acquired under the law of any civilised country are generally enforceable in England, but only that rights which have been, in the opinion of English Courts, properly and rightly acquired, are generally enforceable here. The use of the word "duly" in General Principle No I., in short, intimates that the mere possession of a right by *A* under the law of a foreign country, *e. g.*, of Italy, is not of itself the foundation for its enforcement, or even of its recognition, by English tribunals. The foundation is its due acquisition under the law of Italy. Thus our Principle implies that an English Court will not give effect to *A*'s undoubted right acquired under Italian law, *e. g.*, to be paid £20 by *X*, unless the right be one which in the opinion of English judges ought to have been acquired by *A*, *i. e.*, unless it has been duly acquired.

What, then, is the test of due acquisition? The simplest answer is that rights actually acquired under Italian or any other foreign law are presumably, and until the contrary be shown, to be considered duly acquired; but that want of due acquisition may arise either from the conduct of the sovereign by whom the right is conferred, or, though this is a rare case, from the conduct of the person, *A*, by whom the right is acquired.

A, for example, has under Italian law acquired the rights of a husband with regard to *M*, or has acquired the right to be paid £20 by *X*. The existence of these rights on *A*'s part in Italy is

¹ This is quite consistent with the rule that the *remedy* for a right acquired under French law may, *e. g.*, under a statute of limitation, be lost in France and exist in England, or *vice versa*. Questions as to procedure do not really depend upon the rights of the parties. No person has a vested interest in the course of procedure. See *Wilberforce, Statute Law*, p. 166.

indisputable, and this for the best of all reasons, namely, that if *A* is in Italy the Courts will in fact recognise and enforce his rights and liabilities as *M*'s husband, and if *X* also is in Italy and in possession of property, will enable *A* to obtain payment of the £20 due from *X*. What, then, are the circumstances either in the conduct of the Italian sovereign, or in the conduct of *A* himself, which will lead English Courts to treat the rights undoubtedly acquired by *A* as defective in due acquisition?

First, as to the conduct of the Italian sovereign.

The right conferred by the Italian sovereign and acquired by *A* may lack due acquisition because the right is one which, in the opinion of the English Courts, the King of Italy, acting either as legislator or as judge, has conferred without possessing proper authority to confer it. The Italian sovereign has in the supposed case acted, in the opinion of English Courts, *ultra vires*. The expression *ultra vires* is strictly accurate. A sovereign's authority, in the eyes of other sovereigns and the Courts that represent them, is, speaking very generally, coincident with, and limited by, his power. It is territorial.¹ He may legislate for, and give judgments affecting, things and persons within his territory. He has no authority to legislate for, or adjudicate upon, things or persons (unless they are his subjects) not within his territory.

The Italian, or any other, sovereign may exceed his acknowledged legislative authority.

This kind of excess is rare. The laws of a country apply in general solely to transactions taking place within its borders, or, if they have extra-territorial operation, usually affect only a sovereign's own subjects. But a sovereign's authority to legislate for his own territory, and (with certain qualifications) for his own subjects, is undisputed. Still, cases of legislative action which may be considered *ultra vires* can be found. Thus English Courts do not acknowledge rights which ultimately depend upon the claim of the French sovereign power to determine in accordance with French law the formal validity of a marriage entered into by a French citizen in England.² French tribunals do not, as far as French subjects are concerned, admit the validity of marriages celebrated in France under the Foreign Marriage Act, 1892; and there is no reason to doubt that English Courts would be very slow to admit the validity in England of foreign legislation resembling the Foreign Marriage Act, 1892, or of a foreign law framed

¹ *Ex parte Blain*, 1879, 12 Ch. D. 522; *In re Pearson*, [1892] 2 Q. B. (C. A.) 263. See General Principle No. III., p. 38, *post*.

² *Simonin v. Mallac*, 1860, 2 Sw. & Tr. 67.

on the lines of the Royal Marriage Act, 12 Geo. III. cap. 11, at any rate, if the parties affected by it were domiciled in England.

The Italian sovereign, again, or any other, may exceed his acknowledged *judicial* authority.

This kind of excess is common. Few things are more disputable than the limits within which the Courts of a country have a right to exercise jurisdiction. The plain truth is — and this holds good of England no less than of other states — that every country claims for its own Courts wider extra-territorial authority than it willingly concedes to foreign tribunals.¹ Hence it constantly happens that rights acquired under foreign judgments are refused enforcement on the ground that they are not “duly” acquired.

X, a Swiss subject, enters into an agreement with *A*, a French citizen resident in France. *X*, at the time when the contract is made, is staying at Paris for a week’s visit; he generally lives in England, his domicil is Swiss. *A* sues *X* before a French Court for breach of contract. *X* receives no notice of the action, and is absent during its continuance. *A* recovers judgment against *X* for say £1000. He brings an action on the judgment in England; he fails in his action. The ground of the failure is, that the English Court denies the jurisdiction of the French Court, or in effect holds that a right certainly acquired under French law has not been “duly” acquired.

A is a domiciled Englishman married to *M*; he goes to Germany, stays there a week, obtains a divorce from *M*, and during her lifetime marries *N*. In Germany he is *N*’s lawful husband, but his right to marry her and all rights depending thereupon are in the view of English Courts not duly acquired, and therefore cannot be enforced in England.²

¹ *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155. “We admit, with perfect candour, that in the supposed case of a judgment, obtained in this country against a foreigner under the provisions of the Common Law Procedure Act, being sued on in a Court of the United States, the question for the Court of the United States would be, Can the Island of Great Britain pass a law to bind the whole world? We think in each case the answer should be, No, but every country can pass laws to bind a great many persons.” *Ibid.*, p. 160, *per Curiam*. *Schibsby v. Westenholz* affords an example of legislative and judicial excess of authority. The English Courts under an Act of the English Legislature were authorised and indeed bound to exercise a jurisdiction which English judges did not believe that foreign Courts would admit to be within the proper authority of the British Sovereign.

² See *Lolley’s Case*, 1812, 2 Cl. & F. 567 (n); *Shaw v. Gould*, 1868, L. R. 3 H. L. 55. See further on this subject General Principle No. III., p. 38, *post*, as to the test of jurisdiction.

Secondly, as to *A*'s own conduct. *A* has acquired a right to the payment of £20 to him by *X* under Italian law, *e. g.*, under an Italian judgment. That his right exists in Italy is indisputable. The right, moreover, is one which the Italian sovereign has full authority to confer. *A*, however, has obtained the judgment by fraud. In this case his right is not "duly" acquired, and, on proof of the fraud, will not be enforced by the English Courts.¹

(4) *Civilised Country*.—This term is of necessity a vague one; it may for our present purpose be treated as including any of the Christian states of Europe, as well as any country colonised or governed by such European state, at least in so far as it is governed on the principles recognised by the Christian states of Europe.

England, France, Mexico, the United States, and British India, in so far as governed by British law, are civilised countries. Turkey and China are not civilised states within the meaning of this Rule. The reader should, however, note that the proposition on which I am commenting is simply an affirmative and limited statement; it neither affirms nor denies anything as to the recognition of rights acquired under the laws of countries which are not civilised.²

The reason why the rule as to the recognition of acquired rights is limited, so as to apply to civilised countries only, is that the willingness of one state to give effect to rights gained under the laws of other states depends upon the existence of a similarity in principle between the legal and moral notions prevailing among different communities. Rules of private international law can exist only among nations which have reached a similar stage of civilisation. That English Courts will recognise rights acquired under the law of Italy or of France is certain. That English Courts will recognise rights acquired under the law of China,³ under the peculiar legislation or customs of the Territory of Utah,⁴

¹ See *Abouloff v. Oppenheimer*, 1882, 10 Q. B. D. (C. A.) 295; *Vadala v. Lawes*, 1890, 25 Q. B. D. (C. A.) 310. There are few (if any) cases in which *A*'s conduct militates against the due acquisition of a right conferred by a sovereign who has authority to confer it, except the case of a judgment obtained by fraud. Still other instances are conceivable. If *A* procured by bribery the passing of an Act by an American State Legislature which gave him rights against *X*, it is possible that, on the bribery being proved, English Courts would refuse to enforce the rights given *A* by such Act.

² See App. Note I. — *Law governing acts done in uncivilised countries*.

³ Conf. *Attorney-General v. Kuok-A-Sing*, 1873, L. R. 5 P. C. 179; *Re Tootal's Trusts*, 1883, 23 Ch. D. 532.

⁴ *Hyde v. Hyde*, 1866, L. R. 1 P. & D. 130.

or under the customary law of Bechuanaland,¹ is, to say the least, uncertain. The treatment of the rules as to the extra-territorial effect of law is freed from unnecessary perplexity by excluding from it all reference to the question how far English Courts may, or may not, give effect to the laws of non-civilised communities.²

(5) *Recognised and enforced*.³—The distinction between the recognition and the enforcement of a right deserves notice.

A Court recognises a right when for any purpose the Court treats the right as existing. Thus, if *A*, a Frenchman, marries *M*, a Frenchwoman, in Paris, and they then come to England, our Courts treat acts done by *A* in regard to *M* as lawful because he is her husband which would be unlawful if done by a man not married to *M*. Our Courts therefore recognise *A*'s rights under French law as *M*'s husband. So whenever an English judge considers *A*'s appointment as guardian of *M* by an Italian Court as a reason (though not, it may be, a conclusive reason) for appointing him *M*'s guardian in England, the judge recognises *A*'s rights or status as guardian under Italian law. So, to give another example, a Court recognises *A*'s rights as owner of land in France when treating an agreement made by him in England in reference to such land as a good consideration for a promise made to him by *X*.

A Court enforces a right when giving the person who claims it either the means of carrying it into effect, or compensation for interference with it.

It is plain that while a Court must recognise every right which it enforces, it need not enforce every right which it recognises.

Now English Courts generally recognise rights acquired in a foreign country, and often enforce them. But our Courts constantly recognise rights which they do not enforce. Thus they will treat *A*, a Frenchman, married to *M* in France, as her hus-

¹ *Bethell v. Hildyard*, 1888, 38 Ch. D. 220, with which contrast *Brinkley v. Attorney-General*, 1890, 15 P. D. 76.

² Our principle is, as I have said, only affirmative, and does not negative the probability of English Courts recognising rights gained under the law of Turkey or Japan. It should be noted further that the principle leaves quite untouched the inquiry how far English Courts may apply the law of England to rights which, if they exist at all, arise from transactions taking place in countries which are strictly barbarous. Whether if *X* assaults *A* within the territory of a petty negro chief he has a right of action against *X* in the High Court of Justice, is a problem of some curiosity, but its solution does not fall within the scope of our general principle. Compare *Companhia de Mocambique v. British South Africa Co.* [1892] 2 Q. B. (C. A.) 358; [1893] A. C. 602. See App. Note I. — *Law governing acts done in uncivilised countries*.

³ Compare for this distinction *Piggott, Foreign Judgments* (2nd ed.), chap. i.

band, but it certainly cannot be asserted that they will enforce against *M* all the rights which *A* as her husband may possess against *M* under French law. So again, *A*'s ownership of land in France receives for many purposes legal recognition in England. But no English Court will determine *A*'s title to French land, or attempt to put him into possession of a house in Paris, or give him damages for a trespass on his land at Boulogne.

(6) *English Courts*. — These words are inserted in the proposition under consideration, though it might easily be stated in a more general form, for the sake of emphasising the fact that the principles of private international law are dealt with in this treatise as part of the law of England.

It may be well to note that English Courts expect foreign tribunals to recognise rights acquired under English law, and occasionally attempt by indirect means to enforce such recognition.

Principle No. I., when fully understood, will be seen to be the foundation on which rests, if not strictly the whole, by far the greater part of the rules for determining the extra-territorial effect of law. English Courts do, as a matter of fact, recognise, and to a great extent enforce, rights acquired under the laws of other countries, *e. g.*, France and Italy, and the various rules for dealing with the so-called conflict of laws are mainly rules for determining the law under which a given right is acquired, or the extent to which English Courts shall enforce a right acquired under a foreign law.

The stress laid by me on the recognition given by the Courts of one country to rights which have been acquired, or have vested, under the law of any other civilised country is open to one grave objection. My doctrine may seem to be opposed to a criticism of Savigny's on the analogous theory that "that local law should always be applied by which vested rights shall be kept intact."

"This principle," he writes, "leads into a complete circle; for we can only know what are vested rights, if we know beforehand by what local law we are to decide as to their complete acquisition."¹

The opposition, however, is only apparent. Savigny is searching for a principle which may enable a judge to say whether a given case is to be determined by the law, for instance, of France or of England. Whether any one such criterion can be found may admit of doubt. What is perfectly clear is that, for the reason stated by Savigny, the principle of the enforcement of vested rights does not supply such a universal test. To admit

¹ *Savigny, Guthrie's transl.* (2nd ed.) p. 147.

this, however, is quite consistent with maintaining that this principle does define the object in the main aimed at by rules having reference to the conflict of laws, or to the extra-territorial effect of rights.¹

The negative side of Principle No. I. is all but self-evident. If the aim of English Courts in maintaining the rules of so-called private international law be the recognition of duly acquired rights, it almost necessarily follows that English Courts will not recognise any right which they do not consider duly acquired.

In the application further of Principle No. I. we must constantly bear in mind that, though the principle is for the sake of clearness stated in an absolute form, it is subject to important exceptions or limitations, the definition whereof is a matter of extreme nicety and difficulty. They are embodied in Principle No. II. Principle No. I., therefore, must always be understood subject to the effect of General Principle No. II.

GENERAL PRINCIPLE No II.² — English Courts will not enforce a right otherwise duly acquired under the law of a foreign country :

(A) Where the enforcement of such right is inconsistent with any statute of the Imperial Parliament intended to have extra-territorial operation ;³

(B) Where the enforcement of such right is inconsistent with the policy of English law,⁴ or with the maintenance of English political institutions ;⁵

¹ Savigny, I conceive, has underrated the utility of this principle even, for the determination of the law applicable to the solution of particular cases. In hundreds of instances no difficulty exists in fixing what is the country under the law whereof a right (if it exist at all) has vested. *A* sues *X* for the price of goods sold and delivered by *A* to *X* in a shop at Paris ; both parties are Frenchmen. The right to the payment of the debt clearly vests (if at all) under French law.

² As to the whole of this principle, see especially *Savigny*, s. 349, *Guthrie's transl.* (2nd ed.) pp. 76, 77.

³ The Foreign Marriage Act, 1892 ; The Royal Marriage Act, 1772 ; see chap. xxvi., *post*. The Wills Act, 1861 ; see chap. xxx., *post*.

⁴ *Brook v. Brook*, 1861, 9 H. L. C. 193 ; *Ayerst v. Jenkins*, 1873, L. R. 16 Eq. 275, compared with *Pearce v. Brooks*, 1866, L. R. 1. Ex. 213. This head is illustrated by every case in which procedure is treated as depending on *lex fori*. See chap. xxxi., *post*.

⁵ *Sommersett's Case*, 1771, 20 St. Tr. 1 ; *Birtwhistle v. Vardill*, 1840, 7 Cl. & F. 895 ; *Phillips v. Eyre*, 1870, L. R. 6 Q. B. 1 ; *The Halley*, 1868, L. R. 2 P. C. 193.

(C) Where the enforcement of such right involves interference with the authority of a foreign sovereign within the country whereof he is sovereign.¹

Principle No. II. contains the exceptions to Principle No. I.; and enumerates in very general terms the rights which, though duly acquired under the law of a foreign country, English Courts will not enforce, or allow to operate in England.

(A) *Inconsistency with Statute of Imperial Parliament.*—If an Act of the Imperial Parliament is intended to have operation in foreign countries, an English Court will as far as possible enforce it, and therefore will not give effect to rights inconsistent with such a statute. Thus the Foreign Marriage Act, 1892,² validates marriages made in accordance with its provisions in foreign countries between parties one of whom at least is a British subject. The Act cannot of its own force operate in France, and French judges have treated as invalid marriages between a British subject and a French citizen celebrated in France under a similar enactment. But an English judge must of necessity hold such a marriage valid. If *A*, a British subject, and *M*, a French citizen, marry in France under the provisions of the Foreign Marriage Act, 1892, and *A* subsequently during *M*'s lifetime marries *N*, the latter marriage may be held valid in France, but English Courts will not admit its validity, and will not therefore in England enforce rights claimed by *A* or his descendants in virtue of the marriage with *N*. So again, if *D*, a British subject, makes a will at New York which is valid under the Wills Act, 1861,³ it will be supported as far as the English Courts can do so in England, even though *D* being domiciled in New York, the Courts of that State should hold it invalid for not complying with some provision of New York law; in other words, English Courts will not enforce any rights of *A* acquired under the law of New York inconsistent with the validity of *D*'s will, or in other words, inconsistent with the provisions of the Wills Act, 1861.

(B) *Inconsistency with policy of English Law, etc.*—Under this very general head come a variety of instances which it is hard to refer to any narrower class. They have all this one common characteristic, that they are cases in which English Courts refuse to enforce in England rights which conflict with the fundamental

¹ See especially *Companhia de Mocambique v. British South Africa Co.* [1892] 2 Q. B. (C. A.) 358; [1893] A. C. 602.

² See chap. xxvi., Rule 169, *post*.

³ See chap. xxx., Exception 1 to Rule 182, *post*.

ideas on which English law is grounded, or which are inconsistent with the maintenance of English institutions. The expression "policy of English law" is very vague, but a more precise term would hardly include all the cases which it is necessary to cover. The expression, moreover, is familiar to English lawyers. The chief instances which the general head is intended to include may perhaps be enumerated under five classes. It will be found that, in general, the right which English Courts refuse to enforce, on account of its inconsistency with the policy of English law, conflicts either with the *morality* supported by English Courts, the *status* of persons in England, rights with regard to English *land*, English rules of *procedure*, or, lastly, English law as to what constitutes a *tort*.

Morality. English Courts refuse to give legal effect to transactions, wherever taking place, which our tribunals hold to be immoral. Thus a promise made in consideration of future illicit cohabitation, or an agreement which, though innocent in itself, is intended by the parties to promote an immoral purpose,¹ is according to English law based on an immoral consideration. Such a promise or agreement, therefore, even were it valid in the country where it was made, will not be enforced by English judges. The similarity, however, between the moral principles prevailing in all civilised countries is now so great that the instances are of necessity rare in which English tribunals can be asked to treat as immoral transactions which in a foreign country give rise to legal rights.

Note, nevertheless, that English law may forbid the carrying out in England of transactions which our Courts do not hold to be immoral when taking place abroad. When, for example, the usury laws made the taking of interest above five per cent. illegal, it was still possible to recover in England interest above that amount on loans made in India;² and it is not many years since a contract made in Brazil for the sale of slaves, and there legal, was held to give rise to rights enforceable by English Courts.³

*Status.*⁴ English Courts do not recognise in England any penal (or privative) status arising under a foreign law, as, for example, the status of civil death, or the civil disabilities or incapacities which may be imposed on priests, nuns, Jews, Protes-

¹ *Ayerst v. Jenkins*, 1873, L. R. 16 Eq. 275; *Pearce v. Brooks*, 1866, L. R. 1 Ex. 213.

² *Bodily v. Bellamy*, 1760, 2 Burr. 1094.

³ *Santos v. Illidge*, 1860, 29 L. J. (C. P.) 348; 8 C. B. N. S. (Ex. Ch.) 861.

⁴ See chap. xviii., Rule 122, *post*.

tants, slaves, or others, by the law of the country to which they may belong ; nor (it would seem) do our Courts recognise in England any status unknown to our law, as, for example, relationship arising from adoption.¹

This non-recognition, *e. g.*, of a penal status must be confined to its effect in England. Civil death is unknown to English law. But if, under the law of a foreign country where civil death is recognised, the effect of a person's civil death were to transfer his property there situate to his heir, English law would, it is submitted, recognise the legal effect of such transfer, at any rate in the case of a person domiciled in a foreign country, and in England treat the heir as lawful owner of property which he had acquired through the civil death of his relative.

*Land in England.*² Rights with regard to English land are notoriously determined wholly by the ordinary local law of England.

*Matters of Procedure.*³ The rights as respects procedure of the parties to a suit are utterly unaffected by any foreign law. If A, a Frenchman, sues X, a German, on a contract made in Italy, in the High Court of Justice, he stands, as regards procedure, exactly in the same position as that occupied by Jones, a citizen of London, when he sues Brown, also a Londoner, for the price of goods sold and delivered. To the idea of "procedure," moreover, our Courts give the widest extension. It includes process, evidence, rules of limitation, remedies, methods of execution, and the like. The reason of this is clear. The practice of a Court is determined by the views entertained in the country to which the Court belongs of the right method of compelling the attendance of the parties, of obtaining evidence, and so forth, and the fact that the claim brought before the Court contains a foreign element is no reason why the Court should adopt methods of enforcing the plaintiff's right differing from the methods which the Court, or rather the sovereign under whose authority the Court acts, holds to be best adapted for the purpose in hand. Matters of procedure are in no sense rights of individuals, they are practices of a Court adopted in accordance with the Court's general views of expediency or of justice.

Torts. No act done⁴ in a foreign country, *e. g.*, Italy, can be

¹ See as to adoption a remarkable American case, *Blythe v. Ayers*, 96 Cal. 532 ; 102 Cal. 254.

² See chap. xxii., Rule 138, *post*.

³ See chap. xxxi., Rule 188, *post*.

⁴ See chap. xxvii., Rules 174-176, *post*.

sued for as a tort in England unless it both is a wrong in Italy, and also would have been a wrong if it had been done in England. *A*, for example, sues *X* in England for a libel published of *A* in Italy. He must, in order to maintain his action, establish that the defamatory statement is wrongful by the law of Italy; he must also make out that the statement is one which, if published in England, would render *X* liable to proceedings for libel.¹

This rule sounds somewhat complicated, It is, however, — and this is the point to be noticed, — the strict logical result of Principle No. I. combined with Principle No. II. (B). This will be seen to be so if we follow out our illustration of an action in England by *A* against *X* for a libel published in Italy.

English law does not extend to Italy, and it clearly would be monstrous for English Courts to give damages, *i. e.*, inflict punishment, for an act done in Italy which Italian law holds innocent or, it may be, praiseworthy. *A*, moreover, claims, under General Principle No. I., the enforcement of a right acquired under Italian law. It is, therefore, necessary for him to show that the transaction in respect of which he claims damages from *X* is a transaction which, at lowest, is treated as wrongful by Italian law, *i. e.*, gives him under Italian law a right against *X*. English Courts, on the other hand, will not give damages for — *i. e.*, in effect punish — acts which English law holds innocent or, it may be, praiseworthy, for to do so would be inconsistent with the moral rules upheld by English law. *A* must, therefore, show that the statement complained of would have been libellous if published in England.

(C) *Interference with Authority of Foreign Sovereign.* — An English Court will not give effect to rights which cannot be enforced without the doing of acts in another country inconsistent with the supremacy of the sovereign thereof.

This is the rational though probably not the historical ground on which our Courts decline to entertain an action with regard to the title to foreign land.

Principle No. II. (C) extends to land which, though within the dominions of the British sovereign, is not within the territorial limits of the jurisdiction of the English Courts, such, for example, as land in Scotland or Canada.

The exceptional cases in which Courts of equity have dealt with rights over foreign land² are exceptions which prove or elucidate

¹ See *The Halley*, 1868, L. R. 2 P. C. 193; *Phillips v. Eyre*, 1870, L. R. 6 Q. B. 1; *Nelson, Private International Law*, p. 286.

² See term "foreign," chap. i., *post*.

the rule. The basis of interference by Courts of equity has been the possibility of acting in England directly upon the owner of the land, and of thus indirectly dealing with foreign land without doing any act within the limits of a foreign country.

Principle No. II. contains, as already pointed out, the exceptions to Principle No. I. They are, many of them, both of theoretical and of practical importance. Still, it should be borne in mind that exceptions are exceptional, — a truism which is constantly overlooked, — and are in truth of far less importance than the rule which they modify or limit. As regards the conflict of laws, the essential matter is to keep the mind firmly fixed on the general recognition of vested rights in accordance with or under Principle No. I. It is the basis on which are founded most of the rules of private international law.

Principle No. I. and Principle No. II. are the primary principles of our subject, and apply both to jurisdiction and to choice of law. From these two principles (*i. e.*, from Principle No. I., taken in combination with the exceptions thereto) are derived the four other General Principles treated of in this Introduction; they may, as compared with General Principles No. I. and No. II., be regarded as derivative or secondary principles.

Of these four derivative or secondary principles, two, *viz.*, General Principles Nos. III.¹ and IV.,² refer to jurisdiction; they are the principles which in the main determine both the jurisdiction exercised by the High Court itself, and the jurisdiction which, in the opinion of the High Court, is properly exercisable by the Courts of a foreign country. General Principles Nos. III. and IV. may therefore be aptly termed the criteria, or tests, of jurisdiction; they are in effect tests for determining whether the Courts of a particular country are, in a given matter, Courts of competent jurisdiction,³ and govern the Rules stated in Book II.

¹ See p. 38, *post*.

² See p. 42, *post*.

³ The term "Court of competent jurisdiction" is ambiguous.

(1) It may mean a "Court belonging to a country whose sovereign may, in the opinion of the tribunal called upon to decide the matter, rightly determine, or adjudicate upon, a given case or class of cases."

When used in this sense the term refers to the "extra-territorial," or as it is sometimes called, "international," competence of the sovereign of a particular country, when acting judicially, or, in other words, to the competence of the Courts of that country.

The term Court, or Courts, of competent jurisdiction is, unless the contrary is stated, used throughout this treatise in its extra-territorial sense.

(2) The term may mean a "Court to which the sovereign of a particular country has given authority to adjudicate upon a given case or class of cases."

Of the four subordinate or derivative General Principles already referred to, two, viz., General Principles Nos. V. and VI., apply to the Choice of Law, and govern the rules stated in Book III.

*Jurisdiction.*¹

GENERAL PRINCIPLE NO. III. — The sovereign of a country, acting through the Courts thereof, has jurisdiction over (*i. e.*, has a right to adjudicate upon) any matter with regard to which he can give an effective judgment, and has no jurisdiction over (*i. e.*, has no right to adjudicate upon) any matter with regard to which he cannot give an effective judgment.²

For the proper understanding of this Principle attention should be paid to two preliminary observations.

First. Any question about the competence of the Courts of a country is in reality, whatever the form may happen to be under which it calls for judicial decision, a question about the judicial competence of the sovereign of the country. When, for instance, the High Court decides that a Saxon Court is, whatever the authority given it by the King of Saxony, not a Court competent to divorce persons domiciled in England, the High Court in reality determines that the King of Saxony is not, in the opinion of the High Court, competent to divorce married persons who have an English domicil. So, again, where the High Court decides that it has itself, in general, no jurisdiction to divorce persons not domiciled in England, the High Court in reality determines that the English sovereign is not competent, that is, ought not, to divorce married persons not domiciled in England.

There is of course this difference between the two cases. When the High Court is dealing with the jurisdiction, in matters of divorce, exercised by a Saxon tribunal, the Court may, and does, refuse to give effect to any divorce which, in the opinion of the

When used in this sense the term refers to intra-territorial competence.

With questions of intra-territorial competence this treatise has no concern, and the term Court, or Courts, of competent jurisdiction is not used therein in its intra-territorial sense.

For the further discussion and illustration of the meaning of the term "Court of competent jurisdiction," see chap. xi., *post*.

¹ See as to Jurisdiction, chaps. iv.-xvii., *post*.

² Compare *Companhia de Mocambique v. British South Africa Co.* [1892] 2 Q. B. (C. A.) 358, especially judgment of Fry, L. J., pp. 407-409.

High Court, the King of Saxony, and therefore the tribunal acting under his authority, was not competent to grant. When the High Court, on the other hand, is dealing with the jurisdiction in matters of divorce which the Court itself is called upon to exercise, it must obey the commands of the English sovereign. If, therefore, an Act of Parliament, or some established rule of English law, gives the High Court jurisdiction to divorce persons not domiciled in England, it must exercise the power and perform the duty imposed upon it, even though the Court may be of opinion that the English sovereign ought not to exercise jurisdiction, as regards divorce, over persons not domiciled in England.¹ No Court, in short, can question the competence of the sovereign under whom it acts. This distinction, however, between the attitude of the High Court when dealing with the jurisdiction of foreign Courts and its attitude when dealing with its own jurisdiction is, for our present purpose, of subordinate importance. The High Court is, when dealing with questions of jurisdiction, little fettered by Acts of Parliament, and in the main² follows the general principles which commend themselves to our judges. All that need be noted is that every Court, and the High Court is no exception to the rule, naturally tends to claim for itself a jurisdiction wider than it holds to be in principle properly exercisable by other tribunals. Hence the High Court's mode of dealing with foreign judgments is a better test of the doctrine maintained by it as to the proper limits of jurisdiction than are the rules by which it has defined the boundaries of the High Court's own authority.³

Secondly. An "effective judgment" means a decree which the sovereign, under whose authority it is delivered, has in fact the power to enforce against the person bound by it, and which therefore his Courts can, if he chooses to give them the necessary means, enforce against such person; to look at the same thing from the other side, an effective judgment is a decree which gives to the person who obtains rights under it an actual and not a merely nominal right, that is, a right which, if aided by the sovereign whose Court has delivered the judgment, he can enforce. A judgment which is not "effective" or is "ineffective" means a decree which the sovereign under whose authority it is delivered has not in fact the power to enforce against the person bound by it, and which therefore the sovereign cannot, even if he choose,

¹ See *Niboyet v. Niboyet*, 1878, 4 P. D. 1. Compare *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

² See, however, *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155.

³ See Rules of Court, 1883, Ord. XI.

give his Court the means of enforcing ; to look at the same thing from the other side, an ineffective judgment is one which gives to the person who obtains rights under it a merely nominal right, that is to say, a right which he cannot, even if aided by the sovereign under whose authority the judgment is delivered, actually and in fact exercise. Thus if the King of Italy, or, to use ordinary language, an Italian Court, gives a judgment entitling *A* to the possession of land at Rome which is occupied by *X*, the judgment is effective, since it can clearly, under the authority of the King of Italy, by means of Italian magistrates, policemen, or soldiers, be enforced against *X* in favour of *A*. If, on the other hand, an Italian Court should give a judgment entitling *A* to the possession of land in London occupied by *X*, the judgment is clearly ineffective, for it cannot by the mere power of the King of Italy, his policemen, or his soldiers, be enforced against *X* or in favour of *A*.

If these preliminary observations be borne in mind, the meaning of General Principle No. III. becomes clear. It may be called the "principle of effectiveness," or from another point of view the "test or criterion of effectiveness." However it be named, it amounts simply to this : that the Courts of a country, as representing the sovereign thereof, have a right, in the opinion of English judges, to adjudicate upon any matter with which they have in fact the power to deal effectively, and have not a right to adjudicate upon any matter with which they have not in fact the power to deal effectively.

The "test of effectiveness" may be regarded as an application further of that general recognition of rights duly acquired under the law of any civilised country which is the true basis of all the rules of private international law.¹ These rules exist to ensure the recognition everywhere of rights duly acquired under the law of any civilised country. But the actual acquisition of a right is a matter of fact. A nominal right which cannot be enforced is not in reality acquired. The principle, therefore, that the jurisdiction of a Court is to be recognised then, and then only, when the Court can give an effective judgment is in reality little more than the rule that English judges will treat as acquired under, *e. g.*, an Italian judgment, those rights, and those rights only, which the Courts or, at bottom, the sovereign of Italy can enforce.

SUB-RULE.—When with regard to any matter (*e. g.*,

¹ See General Principle No I., *ante*.

divorce) the Courts of no one country can give a completely effective judgment, but the Courts of several countries can give a more or less effective judgment, the Courts of that country where the most effective judgment can be given have a preferential jurisdiction.

This is a corollary to General Principle No. III. It has not often been distinctly formulated, but it accounts for more than one instance of what may seem an anomalous exercise of jurisdiction.

To understand the bearing of this corollary, let us contrast the effect of a judgment given by an English Court as regards the possession of land in England with a judgment by an English Court divorcing a husband and wife.

The judgment giving possession to *A* of land in London is as effective as the judgment of any Court, or the decree of any sovereign, can by possibility be made. *A* or his representative may, and will, be put into occupation of the land by the servants of the Court, and will not need for the enjoyment of his right as landowner the aid of any foreign tribunal. But if an English Court declares *A* divorced from *M*, the most that such judgment effects is that in England the parties have the rights of unmarried persons. The judgment cannot, of itself, secure that *A* or *M* shall be treated as unmarried in France or Italy, and conversely no sentence of divorce delivered in France can, of itself, secure that the divorced parties shall be treated as unmarried in England. Now the value of a sentence of divorce, given, *e. g.*, in England, depends upon the connection of the parties with England. If they belong to that country, if they habitually reside there, if it is their home or, in technical language, their domicile, then the English sentence of divorce is as effective as the sentence of the Courts of any one country can be. It gives *A* and *M* the status of unmarried people in the country to which they belong, that is to say, in the country where it is, both to them and to the country itself, of most importance that their status as married or unmarried persons should be fixed. If, on the other hand, *A* and *M* are domiciled, say, in New York, the English sentence of divorce is, comparatively speaking, ineffective. Hence the rule that the Courts of a person's domicile have at any rate jurisdiction, if not exclusive jurisdiction, in matters of divorce;¹ and the same principle is, we shall find, applicable not only to all judgments

¹ See chap. vii. and chap. xiv., *post*.

affecting status, but also to jurisdiction in matters of succession to movable property.¹

GENERAL PRINCIPLE No. IV.—The sovereign of a country, acting through the Courts thereof, has a right to exercise jurisdiction over any person who voluntarily submits to his jurisdiction,² or, in other words, the Courts of a country are Courts of competent jurisdiction over any person who voluntarily submits to their jurisdiction.

This principle may be called the “principle of submission,” or, from another point of view, the “test or criterion of submission.” It applies to every kind of civil jurisdiction. It amounts to this, that a person who voluntarily agrees, either by act or word, to be bound by the judgment of a given Court or Courts has no right to deny the obligation of the judgment as against himself.

To a certain extent Principle No. IV. may be treated as an application, or result, of Principle No. III. A person who agrees to be bound by the judgment of a Court, *e. g.*, by appearing as defendant, does often by this mere fact give the Court the means of making its judgment effective against him. Still the principle of submission is, it must be admitted, often based upon grounds different from the principle of effectiveness. It is rather a portion, or development, of the rule that a person is bound by his contracts. Submission, it should be noticed, may take place in various ways, *e. g.*, by a party suing as plaintiff, by his voluntarily appearing as defendant, or by his having made it a part of an express or implied contract that he will, if certain questions arise, allow them to be referred for decision to the Courts of a given country.³

Though General Principles Nos. III. and IV. are (it is submitted) sound, their truth cannot be dogmatically laid down. The doctrine they involve as to the criteria of jurisdiction underlies, it is contended, both the practice of our Courts and judgments or arguments which have met with general approval. But

¹ See chap. xv., Rules 86, 87, *post*.

² See chap. iv., Rule 42, and chap. xii., Rule 80, *post*.

³ *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155; *Copin v. Adamson*, 1875, 1 Ex. D. (C. A.) 17.

With the principle of submission, which applies more or less to all actions, we need concern ourselves but slightly. The main point to which attention should be directed is the extent to which the principle of effectiveness applies to different kinds of jurisdiction.

it cannot in the exact form in which it is here presented claim the direct sanction of English judges or of English text-writers. Hence arises the necessity for justifying this doctrine or theory. Its defence rests on a twofold process: first,¹ the proof that the criteria or tests suggested apply, though not always with equal clearness, to the different kinds of jurisdiction which the High Court either itself exercises or concedes to foreign tribunals; and, secondly,² the examination of the objections which apparently, at any rate, lie against the validity of the doctrine and of the General Principles in which it is expressed.

Let us then first examine the application of the principles or criteria of jurisdiction to different kinds of actions.

(1) *Actions in rem*.³—In such actions jurisdiction admittedly depends primarily upon the *res*, e. g., the ship, being within the control of the Court adjudicating upon the title thereto, or in strictness within the control of the sovereign under whose authority the Court acts.⁴

In other words, the admitted rule as to judgments *in rem* is a direct and obvious application of the principle of effectiveness, and the same remark applies to jurisdiction in respect of immovables, or land, situate in a given territory.⁵ Whenever, indeed, a Court is applied to, as, for example, in the old action of ejectment, for the purpose of obtaining from it possession of land, or a determination of the right to the ownership of land, the proceeding is in substance, though it may not be in form, an action *in rem*.

(2) *Actions with regard to divorce and status*.⁶—Jurisdiction in regard to divorce in general depends, according to English law, upon the domicile of the married persons, one of whom seeks a dissolution of the marriage, i. e., upon the domicile of the husband. The Courts of the domicile do possess, and the Courts of any other country, speaking generally, do not possess, jurisdiction to grant divorce.

No doubt there is a great deal which is artificial in the rules for determining a person's domicile.⁷ A man, and still more often a

¹ See p. 43 to p. 48, *post*.

² See p. 48 to p. 56, *post*.

³ See chap. vi. and chap. xiii., *post*.

⁴ See *Story*, s. 592, and *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414, 428, 429, language of *Blackburn*, J. Compare also chap. xiii., Rule 82 and comment thereon, *post*.

⁵ See *Story*, ss. 589–591, and *Rose v. Himely*, 4 Cranch, 269, 270. See chap. iv., Rules 39, 43; chap. xi., Rule 78; chap. xiii., Rule 82, *post*.

⁶ See chap. vii. and chap. xiv., *post*.

⁷ See chap. ii., *post*.

woman, may be legally held to have his or her home in a country where he or she does not live, and, it may be, never has lived. Hence there is an apparent unreality about the rule which bases a Court's authority to dissolve a marriage upon the domicile of the parties. Still, in the vast majority of cases, a person's domicile is his actual home; it is the country where he, in fact, lives. Hence, far more often than not, a divorce granted by a Court of a person's domicile is the most effective sentence of divorce which can be attainable. The practice, therefore, of the English Courts in this matter is a distinct application of the principle of effectiveness combined with the corollary thereto. To this we must add the consideration that, in questions concerning divorce and status generally, it is of practical importance that the Courts of some one country should have exclusive jurisdiction. We can therefore see why it is that, assuming the validity of the English doctrine of a man's belonging to the country where he is domiciled, the Courts of the domicile at the time when the proceedings for divorce are taken not only have jurisdiction, but, subject to very limited exceptions, have, according to English law, exclusive jurisdiction in the matter. The same remark applies, speaking in broad terms, to all actions with regard to status. We can also see how it comes to pass that English Courts treat other circumstances, such, for example, as the domicile of the parties at the time of the marriage, the place of the marriage, or the place where the offence giving rise to divorce is committed, as immaterial in respect of jurisdiction. These circumstances have nothing to do with the effectiveness of the sentence of divorce.

(3) *Actions with Reference to Succession.*¹ — The Courts of a deceased person's domicile are admittedly Courts of competent jurisdiction to determine the devolution, whether by will or otherwise, of the movable property left by the deceased. Here again we have a clear application of the principle of effectiveness.

A person belongs, according to the view of English judges, to the country where he is domiciled; it is there that he lives, it is there, in the main, that, speaking very generally, his movable property will be found situate. If it be desirable, as would be generally admitted, that the succession to the whole of his movable estate should be determined by some one law, then that law must be the law of the country to which he belongs, *i. e.*, where he dies domiciled. Hence the Courts of a deceased's domicile should certainly be held Courts of competent jurisdiction in regard to succession to movables. Whether they ought to be held to be

¹ See chap. ix. and chap. xv., *post*.

Courts of exclusive jurisdiction is a somewhat different matter, with which it will be convenient to deal in considering the objections to the doctrine that jurisdiction is based in the main on our two principles.¹

(4) *Actions in Personam*.²— This is the class of actions which presents most difficulty to a student bent on ascertaining the theory of jurisdiction upheld by the High Court. One reason of this is that the Court almost admittedly claims for itself a jurisdiction more extensive than it would concede to foreign tribunals.³ Another reason is that the judges of the High Court can hardly be said to have propounded any one guiding principle as to jurisdiction *in personam*, or rather, as we shall show later, the single principle which has been judicially put forward, with more or less authority,⁴ derives its real meaning from the instances and illustrations of it. For guidance as to the jurisdiction claimed by the Court itself we must look partly to the practice (independently of Acts of Parliament) of the old Courts of Common Law and of Equity, partly to a list of the instances in which the jurisdiction of the High Court has received statutable extension.⁵ For guidance as to the jurisdiction conceded to foreign tribunals by the High Court we must look to the, more or less, authoritative enumeration of the cases wherein the judgment of a foreign Court is to be held *primâ facie* binding, as being delivered by a Court of competent jurisdiction.⁶ This list, however, does not profess to be exhaustive, nor, except in so far as it may be confirmed by reported decisions, is it of undisputed authority. Our right course is to take the instances in which the High Court apparently exercises, or concedes, jurisdiction, and show that many of them hold good in principle when tested by our criteria.

The High Court exercises jurisdiction *in personam* both where the defendant is, and often where the defendant is not, in England at the time of the commencement of an action.

First, — where the defendant is in England. The High Court, or rather the Courts of Common Law and of Equity, which for our present purpose make it up, have always claimed jurisdiction *in personam* over a defendant in virtue of the service upon him of the king's writ, and as the writ can be served upon

¹ See pp. 50, 51, *post*.

² See chap. v. and chap. xii., *post*.

³ See *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155, 159.

⁴ *Ibid*.

⁵ Rules of Court, 1883, Ord. XI. r. 1.

⁶ *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155 ; *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351.

any one in England, and cannot, except under statute, be served upon any one out of England, this has been in effect a claim to jurisdiction based on the presence of a defendant in England. But such jurisdiction, though originating in technical rules of practice, is in reality based upon the principle of effectiveness. Whenever the King of England could serve a defendant in England with the royal writ, or command, the King could, if he chose, make his judgment effective against the defendant.¹

Secondly, — where the defendant is not in England. The Courts of Common Law and of Equity have never till recent times claimed or exercised, at any rate directly, jurisdiction over a defendant who was not in England at the time for the service of the writ. The test, therefore, of effectiveness has till recently at any rate held good in its negative, no less than in its positive, aspect.

The Courts of Common Law and of Equity have further always exercised jurisdiction over a defendant who appeared to, or a plaintiff who brought, an action or suit. This again is in strict conformity with the principle or test of submission.

But the High Court now, under statutable powers,² exercises jurisdiction in several cases in which the defendant is not in England, and cannot therefore be served with a writ in England. In dealing with this matter we may dismiss from consideration all actions which directly or indirectly concern land in England;³ they are in reality, though not in form, actions *in rem*, and the jurisdiction of the Court clearly stands the criterion of effectiveness. Two of the other instances in which the jurisdiction of the Court is exercised are: where relief is sought against a person *domiciled*, or *ordinarily resident*, in England;⁴ and next, whenever any injunction is sought as to anything to be done in England, or any nuisance in England is sought to be prevented or removed.⁵

Here again there is no substantial difficulty in applying the principle of effectiveness. The first of these instances is little more than an extension of the rule that a defendant who is present in England is liable to the jurisdiction of the Court. A per-

¹ See as to process 3 *Blackstone*, cap. xix. pp. 279-292, and note particularly as to the different modes of compelling appearance, *First Report of Commissioners for Inquiring into the Process, etc., of Pleading in the Supreme Courts of Common Law*, 1851, pp. 4-7.

² See Rules of Court, 1883, Ord. XI. r. 1.

³ *Ibid.*, r. 1 (a), (b).

⁴ *Ibid.*, r. 1 (c).

⁵ *Ibid.*, r. 1 (f).

son who is domiciled, or is ordinarily resident, in a country is a person against whom a judgment can, if not always yet more often than not, be rendered effective. Something indeed may be said against the admission of domicile as a ground of jurisdiction *in personam*, and this point will be considered in due course.¹ The second of these instances clearly stands the criterion of effectiveness. When an injunction is applied for against something done or to be done in England, the Court is clearly asked to exercise precisely the powers which English Courts, and no others, can effectively exert.

No doubt the High Court does exercise jurisdiction in cases which do not, obviously at least, come within either the principle of effectiveness or the principle of submission, and the existence of these cases² is an objection to the soundness of the doctrine propounded in this Introduction. The force of this objection will receive consideration in its proper place. Meanwhile all that need here be insisted upon is that the jurisdiction *in personam* of the High Court, in so far as it is original and independent of statute, rests almost entirely upon one or other of our two principles of jurisdiction, and, in so far as it is statutable, is to a very great extent based on the principle of effectiveness.

The High Court certainly, or all but certainly, concedes jurisdiction to the Courts of a foreign country in the following cases:³—

(i) Where the defendant is at the time of the action being brought resident [present?] in the foreign country.

(ii) Where the defendant is at the time of the judgment being delivered a subject of the sovereign of the foreign country.

(iii) Where the party who objects to the jurisdiction has by his conduct precluded himself from objecting to the jurisdiction of the foreign Court.⁴

These are the sole instances in which it is in any degree certain that our judges concede jurisdiction *in personam* to the Courts of a foreign country, and some doubt may even be entertained whether jurisdiction would always be conceded solely on account of the defendant's allegiance.⁵

¹ See p. 49, *post*.

² R. S. C. Ord. XI. r. 1 (e), (g); and compare Ord. XVI. r. 48.

³ *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155; *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351. See chap. xii., *post*.

⁴ *Ibid*.

⁵ *Douglas v. Forrest*, 1828, 4 Bing. 686, is the only case known to me which comes near to a decision that allegiance is a basis of jurisdiction. There are, of course, dicta in *Schibsby v. Westenholz*, *Rousillon v. Rousillon*, and perhaps

Now, of these instances, cases i. and ii. clearly come within the principle of effectiveness, whilst case iii. is nothing but the application, or rather the expression, of the principle of submission.

Let us next consider the objections which may fairly be brought against the validity of the proposed criteria of jurisdiction. Our theory of jurisdiction is open to objections of two different kinds.

First objection. — English judges, it may be urged, have maintained a different doctrine, for they have based the jurisdiction of a sovereign, when acting as judge, not on his power to enforce his judgments, but on the “duty” of the person affected thereby (speaking generally the defendant), to obey them.

That the judges have used language which apparently supports this objection is true. “We think,” say the Court of Queen’s Bench, “that the judgment of a Court of competent jurisdiction “over the defendant imposes a duty or obligation on the defendant “to pay the sum for which judgment is given, which the Courts in “this country are bound to enforce; and consequently that any- “thing which negatives that duty, or forms a legal excuse for not “performing it, is a defence to the action.”¹

The answer to this objection is that the doctrine judicially laid down does not in any way contradict the principle here contended for. The language of Baron Parke, adopted by the Court of Queen’s Bench in the passage just cited, is, when taken alone, too vague to afford a test of jurisdiction. The term “duty” cannot be used in its ethical sense. The moral obligation of a defendant, *X*, to obey the judgment of an Italian Court, ordering him to pay £20 to *A*, depends on many considerations which Courts of law, not being Courts of casuistry, do not attempt to touch, and, above all, on the very matter which, in an action on a judgment, cannot be discussed at all, namely, whether *X* does or does not, in fact, owe £20 to *A*. A “duty” from a legal point of view is the correlative to a “right,” and the question, therefore, whether *X* is under a legal duty to obey the judgment of the Italian Court is identical with the inquiry whether the King of Italy, acting through his Courts, has a right to command *A* to pay *X* £20? That this is so is admitted by the very judgment which treats the “duty” of the defendant as a criterion by which

elsewhere, to the effect that the Courts of a country have jurisdiction over a defendant who at the time when the judgment is given is a subject of the sovereign thereof.

¹ *Schiboby v. Westenholz*, 1870, L. R. 6 Q. B. 155, 159, *per Curiam*. See *Russell v. Smyth*, 1842, 9 M. & W. 819; *Williams v. Jones*, 1845, 13 M. & W. 628, 633.

to determine the competence of a foreign Court.¹ We are forced, then, to ask, when has a given sovereign, *e. g.*, the King of Italy, the "right" to issue commands to *X*? This is the problem to be solved. Our criteria are an attempt to solve it. The validity of a solution cannot be affected, one way or the other, by stating the problem which the solution is intended to answer. The Court of Queen's Bench does not in fact really rely upon the vague principle that the validity of a foreign judgment depends on the duty of a defendant to obey it. What the judges really do is to enumerate the circumstances under which this duty arises, and to show that, in the particular case, none of the conditions, which create a duty on the part of a defendant to obey, or the right on the part of a sovereign to issue, a judgment against him, exist. The important thing, therefore, to ascertain is whether the principle of effectiveness and the principle of submission do, or do not, include all the conditions under which, according to the judgment of the Court of Queen's Bench, a person is bound, or is under a duty to obey, the commands of a sovereign.

Here we come across another and much more serious objection to the positions which I am concerned to defend.

Second objection. — The High Court, it may be urged, claims or concedes jurisdiction under circumstances which cannot be covered by either of our principles of jurisdiction.

The validity of this criticism can be determined only by examining the cases of the exercise of jurisdiction which, apparently at least, fall within neither the principle of effectiveness nor the principle of submission.

These anomalous or exceptional cases may be brought under the following heads, to some of which reference has already been made in the foregoing pages.

(1) *Jurisdiction founded upon domicil or ordinary residence.*²

— That a person should be bound by a judgment because he is domiciled in the country where the Court delivering judgment has authority is, it must be admitted, to a certain degree an anomaly.

In actions having reference to status this anomaly may, as already suggested, be without great difficulty accounted for. The Courts of a man's domicil can give a *more effective* judgment with regard to his status, *e. g.*, on the question whether he is to be held legitimate or not, than the Courts of any other country. That jurisdiction should, therefore, in this case depend upon domicil,

¹ *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155, 160, 161.

² See chap. v., Rule 46, Exception 3, *post*.

is in conformity with the principle of effectiveness and the corollary thereto.

That domicile should be the test of jurisdiction in matters of succession to movable property admits also of explanation. It is true that, if each piece of property be looked at separately, jurisdiction ought to belong, not to the Courts of the deceased's domicile, but to the Courts of the country where each piece of property is situate at the time of his death, for it is clear that it is the Courts of the *situs* which can give the most effective judgment with regard to the possession of property situate within a given territory. But if it be convenient, as it certainly is, that the Courts and the law of some one country should determine the succession to the whole of a deceased's movable property, then it is in accordance with the principle of effectiveness that jurisdiction should belong to the Courts of the deceased's domicile.

From the fact, however, that in matters of succession the power of giving an effective judgment belongs rather to the Courts of the *situs* than to the Courts of the domicile, flow some noteworthy results.

In the first place succession to land is determined by the Courts of the country where the land is situate.¹

In the second place, in countries such as England, where a distinct difference is drawn between the administration of and the beneficial succession to movables, every matter connected with administration is within the jurisdiction of the Courts of the country where any articles of a deceased's movable property are locally situate.² *T.*, an intestate, for example, dies domiciled in Portugal, leaving goods, money, etc., in England. The Portuguese Courts indeed are Courts of competent jurisdiction to determine whether *A.*, *T.*'s natural son, is or is not entitled to succeed to such part of *T.*'s money and goods as may remain after the due administration of *T.*'s property in England, *e. g.*, the payment of his debts there, and the decision of the Portuguese Courts in the matter of *A.*'s claim to succeed will be taken as conclusive by English Courts.³ But it is to the English Courts, or to persons acting under their authority, that belongs the right and duty of administration. They are in this matter the Courts of competent⁴ and exclusive jurisdiction.

¹ *Story*, s. 591 ; Rules 39, 43, 78, 82, *post*.

² See chap. ix., Rule 62, *post*.

³ *Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301.

⁴ Compare *Enohin v. Wylie*, 1862, 10 H. L. C. 1, with *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34 ; 1885, 10 App. Cas. 453.

In the third place, though, as regards beneficial succession to movables, the Courts of the deceased's domicile are Courts of *competent* jurisdiction, they are not Courts of *exclusively competent* jurisdiction. Thus, though to follow out our supposed case of a Portuguese dying domiciled in Portugal, and leaving movables in England, the Portuguese Courts are competent to determine whether *A* has a right to succeed beneficially to *T*, yet the right and duty of the English Court in "administering the property, "supposing a suit to be instituted for its administration, is to "ascertain who, by the law of the domicile, are entitled [to succeed "to *T*'s property] and, that being ascertained, to distribute the "property accordingly. The duty of administration is to be discharged by the Courts of this country, though in the performance "of that duty they will be guided by the law of the domicile,"¹ and will follow any decision given in the matter, *e. g.*, as to the right of an illegitimate son to succeed, by the Courts of the domicile.² The admitted rules, in short, as to jurisdiction in matters of succession, arise not from any opposition to the principle of effectiveness, but from a question how best to apply it to the matter in hand. Look at the property of a deceased as a whole, and the Courts of the country to which he belongs (*i. e.*, according to English law, of his domicile) will appear to be in general the tribunals most capable of giving an effective judgment with regard to it. Look, however, at his movable property, not as a whole, but as consisting of separate movables, and then it will appear that the Courts of a country where each movable is situate are the tribunals capable of giving the most effective judgment with regard to such movable. Whatever be the most proper application of the principle of effectiveness, the very difficulties felt by the Courts in applying it show that it is the principle by which they are guided in matters of succession.

Why, however, should domicile be a foundation of jurisdiction in personal actions?

The answer apparently is that, until recently, it never has been, according to English law, a ground for jurisdiction. That it has recently been treated as such must be attributed, either to the habit of resting jurisdiction on domicile in matters of status and of succession, or to the fact that, when a man is "domiciled" or "ordinarily resident" in a country, the Courts of that country

¹ *Enokin v. Wyllie*, 1862, 10 H. L. C. 13, per Lord Cranworth, cited with approval in *Ewing v. Orr Ewing*, 1885, 10 App. Cas. 453, 503, per Lord Selborne.

² *Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301.

can, if not always, yet frequently, make a judgment against him effective, with which fact is combined the consideration that a man who has his domicile or ordinary residence, *e. g.*, in England, may perhaps be taken to submit to the jurisdiction of the English Courts. However this may be, the admission ought to be made that, as regards actions *in personam*, it is something of an anomaly that domicile should be made a ground of jurisdiction.

(2) *Jurisdiction founded on place of obligation.*¹ — It is sometimes asserted that the High Court recognises the jurisdiction of the *forum obligationis*, that is, of the Courts of the country where an obligation is incurred, or, in the terms of English law, a cause of action has arisen.² For this assertion, however, if made in its full breadth, no decisive authority can be cited. Neither at Common Law nor in Equity did the *mere fact* of a tort having been committed, or of a contract having been made or broken, in England, give the Courts jurisdiction over a defendant not present in England, and there is no reason to suppose that the English Courts have ever conceded to foreign tribunals authority more extensive than that which the English Courts claimed for themselves. At the present moment, moreover, not only is there nothing to show that the commission of a tort,³ whether in England or in a foreign country, is held by our judges to give jurisdiction in respect of the wrong to the Courts of the country where the wrong is committed; but there is some, though not decisive, authority for the assertion that they do not recognise such a ground of jurisdiction.⁴

The Common Law Procedure Act, 1852, ss. 18, 19, indeed gave the Common Law Courts jurisdiction (which the judges themselves thought in principle hardly defensible)⁵ over a defendant not present in England, when either the cause of action arose in England or depended upon the breach of a contract made in England,⁶ and the High Court now claims jurisdiction *in personam*

¹ See chap. v., Rule 46, Exception 5, and compare chap. xii., Rules 80, 81, *post*.

² See *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155, 161, compared with *Westlake*, 3rd ed., pp. 345, 346, and Rules of Court, 1883, Ord. XI. r. 1 (e).

³ See *Companhia de Mocambique v. British South Africa Co.* [1892] 2 Q. B. (C. A.) 358, 413, judgment of Fry, L. J.

⁴ *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670. Compare chap. xii., Rule 81, *post*.

⁵ *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155.

⁶ C. L. P. Act, 1852, s. 18. And see *Jackson v. Spittall*, 1870, L. R. 5 C. P. 542; *Durham v. Spence*, 1870, L. R. 6 Ex. 46; *Altkusen v. Malgarejo*, 1868, L. R. 3 Q. B. 340.

over an absent defendant when the action is founded on a breach in England of any contract, wherever made, which, according to the terms thereof, ought to be performed in England.¹ Whether the High Court would concede an analogous jurisdiction to foreign tribunals is a point on which no certain opinion can be pronounced, whilst authority can be cited² for the proposition that the mere circumstance of a contract having been made in a foreign country does not give jurisdiction to the Courts thereof. Assume, however, that the High Court holds that foreign Courts can exercise any jurisdiction which it claims for itself; even then the respect paid by our judges to the *forum obligationis* is reduced to this, namely, that the Courts of a country have, in the opinion of the High Court, jurisdiction over a defendant who has broken in that country a contract which, by the terms thereof, ought to be performed there.

Even this amount of respect for the *forum obligationis* cannot, it will be said, be explained by the principle of effectiveness. This is true; but the jurisdiction of the Courts of a country where a contract is intended to be performed, and is in fact broken, admits of explanation as an extension of the principle of submission. If *X* contracts with *A* to do something, *e. g.*, build a house or deliver goods in France, there is, at any rate, some ground for the assumption that *X* and *A* tacitly agree to submit any controversy as to the performance of the contract by *X* to the decision of the French Courts. If this explanation be thought far-fetched, then the deference, limited as it is, paid to the *forum obligationis* must be treated as an anomaly, suggested to English judges when framing rules as to jurisdiction³ by the provisions of the Common Law Procedure Act, 1852, ss. 18, 19.

(3) *Jurisdiction founded on possession of property.*⁴ — Ought the possession of immovable or movable property in a particular country to give the Courts thereof jurisdiction over the possessor? This is a question which, in the opinion of English judges, is still open to discussion.

Two points, however, must be carefully distinguished.

The possession of property, whether land or goods, undoubtedly gives the Courts of the country where the property is situate juris-

¹ Rules of Court, 1883, Ord. XI. r. 1 (e).

² *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351. Compare especially, *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670, and see chap. xii., Rule 81, *post*.

³ Rules of Court, 1883, Ord. XI. r. 1.

⁴ Compare chap. v., Rule 46, Exception 4, and chap. xii., Rule 81, *post*.

desirability (*e. g.*, in the case of divorce) of enabling the Court of some one country to give a final decision on matters as to which the Court of no country can give an absolutely effective judgment. In other instances the rule as to jurisdiction is doubtful, but in these the doubt is found, on investigation, to arise not from the invalidity of our tests, but from a difference of opinion on the result to which the application of these tests leads. There are, further, one or two cases in which our Courts for purposes of convenience exercise a jurisdiction, which they would not concede to foreign tribunals. If, however, the instances in which our tests obviously hold good be fairly compared with the few instances in which their validity is disputable, the conclusion to which we are led is that the principle of effectiveness and the principle of submission are the true, though not perhaps the sole, criteria of jurisdiction.

*Choice of Law.*¹

GENERAL PRINCIPLE NO. V. — The nature of a right acquired under the law of any civilised country must be determined in accordance with the law under which the right is acquired.²

This principle is an immediate inference from Principle No I. If *A* acquires, under the law of France, a right to be paid £20 by *X*, it follows that, if *A* is to enforce his right, we must inquire exactly what the right is which the law of France gives him, for if this is not done, and the case is determined exactly as if the debt had been incurred in England, then it is possible that *X* may receive something more or less than he can fairly claim, or, in other words, that English Courts may enforce, not the right acquired under the law of France, but some different right. But to do this is to violate General Principle No. I. We may see more clearly that this is so, if we suppose the French Courts to be called upon to enforce a right acquired by *A* against *X* under the law of England. The reason why they enforce *A*'s claim at all is the advisability of giving effect in France to rights acquired by one Englishman against another in England. But, if English law be not regarded as to the nature of the right acquired, we can see

¹ See as to choice of law, chapters xviii. to xxxi., *post*.

² See *Hooper v. Gumm*, 1867, L. R. 2 Ch. 282, 289, judgment of *Turner*, L. J. Compare *Anderson v. Laneville*, 1854, 9 Moore P. C. 325, and *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

in a moment that error and injustice would be the result. Thus, *X* and *A* are Englishmen, living in England. *X*, out of gratitude to *A*, but for no consideration whatever, promises *A* to pay him £100. The promise gives *A* no legal right whatever, under English law, to the payment of the £100 by *X*. Both parties being in France, *A* sues *X* in a French Court for the £100 as a debt owing to him. If *A*'s claim be measured, as it ought to be, by English law, then *A* will recover nothing; having acquired no right to payment under English law, he possesses no right which he can enforce in France. If, on the other hand, the nature of *A*'s claim be not measured by English law, then he may very possibly recover £100; with the result that he enforces not a right duly acquired under English law, but a non-existent right which the French Courts erroneously thought he had acquired under English law. The French Courts, in other words, through neglect of Principle No. V., fail in their effort to enforce in France a right acquired under the law of England.¹

GENERAL PRINCIPLE No. VI. — Whenever the legal effect of any transaction depends upon the intention of the party or parties thereto, as to the law by which it was governed, then the effect of the transaction must be determined in accordance with the law contemplated by such party or parties.²

This is a canon having reference, not to the *acquisition* but to the *interpretation* of rights; it defines a second ground on which English Courts have to consider the effect of foreign law. In the cases which come within it regard is paid to foreign law, not because such law confers any rights upon a given person, but because the terms of the law explain what are the rights which given persons intended to give or acquire in consequence of a particular transaction.

In many instances the legal effect of a person's conduct is inde-

¹ Compare as to possible mistake as to the law of England, *Castrique v. Inrie*, 1870, L. R. 4 H. L. 414. It seems to follow that where a promise, governed by the law, *e. g.*, of Scotland, is under Scotch law valid, without a consideration, an action may be maintained upon it in England.

² As to contracts, see *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115; *Greer v. Poole*, 1880, 5 Q. B. D. 272; *In re Missouri Steamship Co.* 1889, 42 Ch. D. (C. A.) 321. As to marriage settlements, see *Este v. Smyth*, 1854, 18 Beav. 112, 121, 122, judgment of *Romilly*, M. R. As to wills, see *Bradford v. Young*, 1885, 29 Ch. D. (C. A.) 617, 625; *Studd v. Cook*, 1883, 8 App. Cas. 577; *Nelson*, *Cases on Priv. Int. Law*, p. 193.

pendent of his will or intention. In others, and notably in the case of wills or contracts,¹ the aim of the Courts is to carry out the intention or wish of some given person or persons, and if the Courts are called upon to construe a testamentary document or agreement, they must look to the intention of the testator or of the contractors. But such intention cannot in most cases be ascertained without considering what was the law with reference to which the testator made his will, or the contractors entered into an agreement. The person whose intention has to be ascertained — we will suppose him, for the sake of simplicity, to be a testator — may point out in so many words what is the body of rules, or the law in reference to which his will is to be construed. An Englishman domiciled in England may say expressly that he wishes his property to be distributed, in so far as English law does not forbid such distribution, in accordance with the principles laid down by Bentham in his *Principles of a Civil Code*, chapter iii., or in accordance with the provisions of the *Code Napoléon*. In the one case it would be necessary to examine the writings of the jurist, in the other it would be necessary to examine the French Code, in order to determine what were the intentions of the testator. The rights of the persons benefited by the will would depend, in the one instance, on the doctrines of Bentham, and in the other on the provisions of the *Code Napoléon*. It is of course perfectly plain that neither Bentham's writings nor the Code would be the *source* of the rights acquired by the will; the source would be the law of England giving effect to the intention of the testator. Bentham's works, or French law, would be consulted only with a view to ascertaining what were the testator's intentions. Foreign law, to confine our attention to the *Code Napoléon*, would be not the source of a right, but simply a necessary means of interpreting a right. So if *A* and *X* enter into a contract to be carried out in France, and expressly provide that its terms shall be construed in accordance with French law. An English judge, called upon to decide whether the agreement has or has not been broken, must of necessity consider the nature of the French law of contract.²

These remarks apply equally to the far more frequent cases in which, though a document contains no explicit incorporation of foreign law, the inference may fairly be drawn, either from the terms used or from the nature of the transaction, that it was

¹ See chap. xxiv., Rules 143, 149, and Sub-Rules thereto, *post*.

² See, for an illustration of the incorporation of foreign law in a contract, *Dobell v. Steamship Rossmore Co.* [1895] 2 Q. B. (C. A.) 408.

written or executed with reference to the law of some foreign country. Suppose, for example, that a Frenchman, domiciled in England, makes a will in which the terms of French law are employed, it becomes necessary to consider, in construing the will, whether we must not incorporate into it the law of France, and a similar question occurs wherever a contract is entered into which, though containing no reference to French law, is to be wholly or partially performed in France. "The general principle, in short, "by which the Court [is guided] in the solution of the question as "to what law ought to prevail [is] that the rights of the parties "to a contract are to be judged of by that law by which they intended, or rather by which they may justly be presumed to have "intended, to bind themselves,"¹ and all the special rules of interpretation enjoining that a contract must be construed in some instances according to the law of the domicile of the parties, in others according to the law of the flag, in others according to the law of the place or performance, or in others according to the law of the place where the contract is made, are, in so far as they hold good, simply applications to special circumstances of the principle that you must look to the intention of the parties. By "intention," however, we must always remember is meant, not the expressed, or even the consciously entertained, intention of the particular persons, but the intention which, in the opinion of the Court, most persons in the position of the particular parties would have entertained had their minds been called to the matter at the moment of entering into a contract or other legal transaction.

What for our present purpose deserves particular attention is, that reference to foreign law under Principles No. V. and No. VI. is due to different causes. Under Principle No. V. our Courts look to foreign law as the *source* of an alleged right; under Principle No. VI. they look to foreign law as an *interpretation* of an alleged right. If, for example, *A*, a French citizen, sells and delivers goods at Paris to *X*, another French citizen, and sues *X* for payment in England, *A*'s right to payment by *X*, if it exist, originates in, and depends upon, French law. It is in reality a "French right," if the expression may be used, which *A* attempts to enforce in England, and to such an attempt any provision of French law which extinguishes *A*'s right is an answer.² If,

¹ See *In re Missouri Steamship Co.* 1889, 42 Ch. D. (C. A.) 321, 326, 327, per Chitty, J.; *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115, 122. See Foote, 2nd ed., p. 377.

² See *Rouquette v. Overmann*, 1875, L. R. 10 Q. B. 525. Note that a mere extinction of *A*'s remedy, *e. g.*, by a law of limitation, is not the same thing as the extinction of *A*'s right. See Comment on Rule 188, chap. xxxi., *post*.

on the other hand, *A* and *X*, two Englishmen domiciled in England, make a contract, or *T*, an Englishman domiciled in England, executes a will, the terms whereof to a certain extent embody the law of France, the rights of the parties under the contract or of the beneficiaries under the will arise from the law of England, though they cannot be interpreted without reference to the law of France; just as, to recur to an example already used, the will of an Englishman domiciled in England, under which the testator's property is to be distributed in accordance with the views of Jeremy Bentham, needs for its interpretation a reference to Bentham's works, though it is clear that the rights of the beneficiaries under the will depend, not upon any authority possessed by Bentham, but upon the law of England.

The distinction between the two different grounds for the application of foreign law to the determination of a given case has been sometimes overlooked; nor is it always very easy to see on which of the two grounds it is that foreign law is really applicable. The determination, however, of what may seem a fine point may be of considerable importance.¹

It should, however, be observed that General Principle No. VI., no less than General Principle No. V., is nothing but an application of the fundamental canon of private international law embodied in General Principle No. I.; they are both of them maxims for ascertaining what is the legal right in fact acquired by a given person, *A*, which therefore our Courts may under Principle No. I. rightly enforce. If his right is acquired under the law of France, you must determine its existence and nature by French law, *i. e.*, you must apply General Principle No. V.; if his right again, though acquired under the law of England, is to be interpreted by reference to the law of France, you must explain and define it by reference to French law, *i. e.*, you must apply General Principle No. VI.

What, it may be asked, is the true nature and the real value of the General Principles propounded in this Introduction?

They are not axioms whence may at once be logically deduced the Rules to be found in the body of this treatise.

They are not again propositions covering the whole field of private international law and possessing such accuracy and precision as to be applicable with confidence to the solution of the novel questions, which from day to day arise as to the extra-territorial

¹ Compare *In re Missouri Steamship Co.* 1889, 42 Ch. D. (C. A.) 321; *Hamlyn v. Talisker Distillery*, [1894] A. C. 204; 6 R. 188.

recognition of rights. With regard, indeed, to some departments of law (such, for example, as the law of contract) which have been fully worked out, and the fundamental conceptions whereof have been finally determined in England by many years of judicial legislation, it may be possible to lay down leading propositions which cover the whole subject. With regard to the rules of private international law recognised by English Courts this is impossible. These rules are of recent growth. They are subject to constant change and expansion. Whilst many single maxims may be treated as well established, many of the fundamental ideas on which the system rests are far from being well defined or beyond dispute, and rules, it must be added, which are repeated in text-books, and even in judgments, will often be found on examination to rest on a very narrow basis of precedent; whilst the actual practice of the Courts in some instances hardly coincides with doctrines nominally laid down in judgments of received authority.

But though the foregoing General Principles are neither axioms, nor precisely stated propositions which cover the whole field of private international law, they possess a distinct character and value of their own.

They are essentially generalisations suggested by the decisions of the Courts taken in combination with judicial dicta, and with the doctrines in regard to the conflict of laws propounded by writers, such as Story, Westlake, or Savigny, of acknowledged weight and authority. These generalisations, though not laid down, in so many words, by English judges, do, it is submitted, express the grounds on which reported decisions may logically be made to rest; they are far less the premises from which our judges start, when called upon to determine any question of private international law, than the principles towards the establishment of which the decisions of our Courts gradually tend. They mark not so much the *terminus a quo* as the *terminus ad quem* of judicial legislation. The doctrine, for example, which is embodied in General Principle No. I., of the extra-territorial recognition of duly acquired rights, is rarely, if ever, enunciated in its full breadth by an English Court. But hardly a month passes without some judgment being delivered in some Division of the High Court which exhibits the increasing influence in England of the tendency, prevalent throughout the civilised world, to give full effect to rights acquired under,¹ or in some way measured by,² foreign law. The principle again, that the jurisdiction of a country's Courts is, or ought to be, governed by the criterion of

¹ General Principle No. V.

² General Principle No. VI.

effectiveness,¹ may be nowhere authoritatively laid down as a maxim recognised by the law of England. But our Courts do to a very great extent regulate the exercise of their own jurisdiction, and still more often determine what recognition is to be given to foreign judgments by reference to the test of effectiveness. Even the anomalous instances in which this criterion or principle is disregarded cannot be understood unless the principle itself is recognised; for the true bearing of an exception is never fully perceived without a knowledge of the rule from which it is a deviation.

When the nature of these General Principles is appreciated, their true value becomes apparent. They open to students a general view of the whole subject of private international law as administered by English Courts. They indicate the direction in which the rules as to the extra-territorial recognition of rights tend, and thus give a rational meaning to maxims which, when taken by themselves, appear arbitrary or conventional; and, if they do not directly solve new problems of private international law, help us in perceiving what are the problems which need solution. These General Principles, in short, in so far as they are correct generalisations obtained from and confirmed by decided cases, place a reader in the right position for appreciating the meaning and the effect of the body of rules which regulate the extra-territorial recognition of rights.

¹ General Principle No. III.

BOOK I.

PRELIMINARY MATTERS.

BOOK I. treats of matters which are in strictness preliminary to the Rules contained in Books II. and III.

Chapter I. contains the interpretation of certain terms, such for example as "country," "foreign country," and the like, which often occur in the subsequent Rules, and the accurate apprehension whereof facilitates the understanding of the whole Digest.

Chapter II. contains Rules for determining a given person's domicile.

Chapter III. contains Rules for determining a person's "nationality," in so far, at least, as it is necessary for the application of the Rules contained in Books II. and III., to decide whether he is, or is not, a British subject.

The principles, it is true, which regulate the acquisition, or loss, of domicile or of nationality are not in themselves rules for determining the extra-territorial effect of law, and may therefore seem to lie outside the scope of this treatise. But the application of many of our Rules, and notably of those relating to testamentary and intestate succession, frequently depends upon the ascertainment of a person's domicile, and occasionally upon determining whether he is a British subject or an alien. The reader therefore should have before him the principles which regulate the acquisition, loss, and resumption, both of domicile and of British nationality.

CHAPTER I.

INTERPRETATION OF TERMS.¹

I. DEFINITIONS.

IN the following Rules and Exceptions, unless the context² or subject-matter otherwise requires, the following terms have the following meanings.

1. "This Digest" means the Rules and Exceptions contained in Books I. to III. of this treatise.

2. "Court" means Her Majesty's High Court of Justice in England.

3. "Person" includes a corporation or body corporate.³

4. "Country" means the whole of a territory subject under one sovereign to one system of law.⁴

5. "State" means the whole of the territory (the limits whereof may or may not coincide with those of a country) subject to one sovereign.⁵

6. "Foreign" means not English.⁶

7. "Foreign country" means any country which is not England.⁷

¹ The terms defined are intended to bear in the Rules and Exceptions which make up the Digest the meaning here given them. It is not meant that they should necessarily have the same sense in the comment which accompanies the Digest. To restrict in the comment the use of every term used in the Digest to the special meaning there given it, would involve the employment of strained or unnatural language without conducing to the intelligibility or precision of the comment.

² The sense given to a term in this clause is occasionally varied in express words in some of the subsequent Rules. See, *e. g.*, definition of "Court," Rule 52, *post*.

³ See p. 66, *post*.

⁴ See p. 66, *post*.

⁵ See p. 68, *post*.

⁶ See p. 68, *post*.

⁷ See p. 68, *post*.

8. "England" includes any ship of the Royal Navy wherever situate.¹

9. "United Kingdom" means the United Kingdom of England, Scotland, and Ireland,² and the islands adjacent thereto, but does not include either the Isle of Man or the Channel Islands.

10. "British dominions" means all countries subject to the Crown, including the United Kingdom.

11. "Domicil" means the country which in accordance with the Rules³ in this Digest is considered by law to be a person's permanent home.⁴

12. "Independent person"⁵ means a person who as regards his domicil is not legally dependent, or liable to be legally dependent, upon the will of another person.

13. "Dependent person" means any person who is not an independent person as hereinbefore defined, and includes :

(i) a minor.

(ii) a married woman.

14. "An immovable" means a thing which can be touched but which cannot be moved, and includes, unless the contrary is expressly stated, a chattel real.⁶

15. "A movable" means a thing which is not an immovable, and includes :

(i) a thing which can be touched and can be moved, and

(ii) a thing which is the object of a claim,⁷ and cannot be touched, or, in other words, a *chose in action*.

16. "*Lex domicilii*," or "law of the domicil," means the law of the country where a person is domiciled.⁸

17. "*Lex loci contractus*" means the law of the country where a contract is made.⁹

¹ See p. 68, *post*.

² More formally, the United Kingdom of Great Britain and Ireland.

³ See Rules 1 to 18, and, as to domicil of corporations, Rule 19, *post*.

⁴ Compare p. 80, *post*.

⁵ See p. 69, *post*.

⁶ See p. 71, *post*.

⁷ See p. 71, *post*.

⁸ See p. 73, *post*.

⁹ See p. 74, *post*.

18. "*Lex loci solutionis*" means the law of the country where a contract is to be performed.¹

19. "*Lex situs*" means the law of the country where a thing is situate.²

20. "*Lex fori*" means the local or territorial law of the country to which a Court, wherein an action is brought, or other legal proceeding is taken, belongs.³

Comment.

(3) *Person*.⁴ — The word "person," both in law and even as used in common conversation, includes not only a natural person or human being, but also an artificial person or, speaking broadly, a corporation. This wide sense is the meaning given to the word in this Digest.

It must, however, be remembered that every definition is to be taken subject to the reservation "unless the context or subject-matter otherwise requires." There are many Rules which can obviously apply only to natural persons.⁵

(4) *Country*. — The word "country" has among its numerous significations the two following meanings,⁶ which require to be carefully distinguished from one another.

(i) A country, in what may be called the political sense of the word, means "the whole of the district or territory, subject to one sovereign power,"⁷ such as France, Italy, the United States, or the British Empire.

¹ See p. 74, *post*.

² See p. 74, *post*.

³ See p. 75, *post*.

⁴ Only those terms are commented upon which need some explanation.

⁵ *E. g.*, Rule 8, *post*.

⁶ It means, for example (in its geographical sense), "a geographical district making up a separate part of the physical world," as in the expression, a newly discovered country. It means again (in what may be termed its historical sense) a land inhabited, or supposed to be inhabited, by one race or people, as, for instance, Italy, before the Italians were united under one Government. Neither the geographical nor the historical sense of the word directly concern writers on law, but the geographical sense is worth notice, as putting in ordinary language a limit to the use of the word in its political and legal senses. There is an awkwardness, though one which cannot be avoided, in calling the whole British Empire one "country" in the political sense of the term. The awkwardness is due to the excessive deviation in this application of the word from its more ordinary geographical sense.

⁷ The term sovereign, or sovereign power, is, it need hardly be observed, not used here in the sense of a king or monarch, but in the sense in which it is employed by jurists, of the power, whatever its form, which is supreme in an independent political society. See *Austin, Jurisprudence*, 4th ed., i. p. 249.

A country in this sense is sometimes called a "realm," with reference to the sovereign and his authority over the territory and over his subjects therein. It is sometimes termed a "state," in one of the many meanings of that word, when considered in reference to the citizens and their allegiance to the sovereign who has authority over the territory.

The word country is not, in this Digest, used in its political sense of a realm or state.

(ii) A country, in what may be called the legal sense of the word, means "a district or territory, which (whether it constitutes the whole or a part only of the territory subject to one sovereign) is the whole of a territory subject to one system of law;" such, for example, as England, Scotland, or Ireland, or as each of the States which collectively make up the United States.

For the term country, in the legal sense of the word, there is no satisfactory English substitute. If the use of a new term be allowable, a country might, in this sense (on the analogy of the Latin *territorium legis* and the German *Rechtsgebiet*), be called a "law district," and this expression is occasionally used in this treatise.

The term country is, with one possible exception,¹ throughout this Digest, and generally (though not invariably) in the body of the work, used in its legal sense of law district.

It is worth while to dwell a little further upon the relation between the meaning of the word country in its political sense of realm and its legal sense of law district.

Territories ruled by different sovereigns never constitute one country in either sense of the term, but a territory ruled by one and the same sovereign, *i. e.*, a realm, though it may as a fact constitute one country or law district, may also comprise several such countries or law districts.

Thus France, Italy, and Belgium, each constitute one separate country in both senses of the term. France (including, of course, in that term French dependencies) is one country in the political sense of the word, and is also one country or law district in the legal sense of the term. On the other hand, the British Empire, while constituting one country, realm, or state in the political sense of the term country, consists of a large number of countries in the legal sense of the word, since England, Scotland, Ireland, the Isle of Man, the different colonies, etc., are in this sense separate countries or law districts.

¹ See Rule 35, *post*, where the language of the Naturalization Act, 1870, is followed.

(5) *State*. — The word “state” has various senses. It is often used as meaning a political society, governed by one and the same sovereign power. Here it is used in contrast with country as the whole of the territory, subject to one sovereign power. The limits of a state obviously may, or may not, coincide with the limits of a country.

(6) *Foreign*, and (7) *Foreign Country*. — The word “foreign” means, as used throughout this Digest, simply “not English.” Thus, a Scotch parent is as much within the term foreign parent as an Italian or a French parent. The expression “foreign country” means any country except England, and applies as much to Scotland, Ireland, New Zealand, etc., as to France or Italy.¹

(8) *England*. — The word “England” is used in its ordinary sense of England and Wales, including any adjacent islands, such as the Isle of Wight or Anglesea, which form part of, or are, English or Welsh counties. The word, however, is by our definition extended so as to include a ship of the Royal Navy wherever situate, *e. g.*, when lying in an Italian port;² such a ship is, it is said,³ regarded by a fiction of law as part of the parish of Stepney. In any case, a person on board thereof is within the territorial jurisdiction of the High Court, *i. e.*, is considered as being in England, and R. S. C. 1883, Order XI. r. 1, as to service of a writ out of the jurisdiction,⁴ is inapplicable to him.⁵ A British merchant ship, when on the high seas, is part of British

¹ See, however, *In re Orr Ewing*, 1882, 22 Ch. D. (C. A.) 456, 464, 465, for an objection by *Jessell*, M. R., to the use of the word “foreign,” as applied to Scotland. His objection in effect is that Scotland is not a foreign country, but “ever since the union of the kingdom of Great Britain . . . has been an integral part of Great Britain.” The reply to this objection is, first, that Scotland, though of course not a “foreign” country in the sense in which the word “foreign” is popularly and rightly used in ordinary discourse, certainly is a “foreign” country in the sense in which these words are defined in this treatise, and, secondly, that such a definition is both justifiable and convenient in a book treating of the conflict of laws. The justification is to be found in the fact that English Courts do, in regard to questions having reference to the conflict of laws, in most, though not quite in all respects, treat Scotland and Ireland as “foreign countries,” or, in other words, the rules of private international law are applied by the High Court in England in pretty much the same manner to all other countries, whether they are or are not subject to the British Crown. This fact is made prominent, as it ought to be, by applying to all countries, except England, the epithet “foreign.”

² *Seagrove v. Parks*, [1891] 1 Q. B. 551.

³ See *Annual Practice*, 1892, p. 249.

⁴ Compare Rule 46, and Exceptions thereto, *post*.

⁵ *Seagrove v. Parks*, [1891] 1 Q. B. 551.

territory, but under what circumstances, and to what extent, she is to be considered as part of England is open to some question.¹

(11) *Domicil*. — A person's domicil is the place or country which is considered by law to be his permanent home.²

This merely verbal definition of the term "domicil" applies to all cases in which the word is used. Whenever a person of any description is said to be domiciled, or to have his domicil, in a particular country, *e. g.*, France, the least which is meant is that he is considered by the Courts to have his permanent home in France, and will be treated by them as being settled in France, or, in other words, that France is considered by the Courts to be his permanent home.

The words "considered by law" are important, and point to the fact that a person's domicil need not necessarily be his actual home; or, to put the same thing in another form, that the existence of a domicil is not a mere question of fact, but an inference of law drawn from the facts, whatever they may be, from which the Courts infer that a person has a domicil in a particular country.

This very general definition applies further to the domicil of both the classes of persons known to the law (that is to say):

- (1) Natural persons (or human beings).
- (2) Legal persons (or corporations).

Any more specific, and therefore narrower, definition of the term would not cover the domicil both of human beings and of corporations. For further information as to the nature and meaning of domicil, the reader is referred to the Rules explaining its meaning or nature, with reference, first, to natural persons;³ secondly, to corporations.⁴

(12) *Independent Person*, and (13) *Dependent Person*. — An independent person means a person who, as regards the legal effect of his acts, is not dependent on the will of any other person, or, in other words, whose will is for legal purposes exercised by himself, and by himself alone. Since the term is used in this Digest with reference to a person's legal capacity for acquiring or changing his domicil by his own acts, it means, as here used, a person

¹ The answer to this question may conceivably affect the validity of a marriage on board a British merchant ship. See chap. xxvi., comment on Rule 169, *post*.

² See Rules 1 to 19, *post*.

³ See Rules 1 to 18, *post*.

⁴ See Rule 19, *post*.

legally capable of effecting a change of domicil, and who is not liable to have it changed by the act of any other person.¹

The position of an independent person has two characteristics, the one positive, the other negative. The positive characteristic is the full legal capacity to act for himself, especially in the change of domicil. The negative characteristic is freedom from liability to be legally acted for, and especially to have his domicil changed at the will of another person.

Under English law a man of full age, or an unmarried woman of full age, is such an independent person.

A dependent person means a person who, as regards the legal effects of his acts, is dependent, or liable to be dependent, on the will of another person, or, in other words, whose will, as regards its legal effects, cannot be exercised by himself, and may be exercised by another person. Since the term is used in this Digest with reference to a person's legal capacity for acquiring or changing his domicil by his own acts, it means, as here used, a person who is not legally capable of effecting a change of domicil for himself, but whose domicil is liable to be changed (if at all) by the act of another.²

The position of a dependent person has therefore two characteristics, the one negative, the other positive. The negative characteristic is legal incapacity to act for himself, especially in the change of domicil. The positive characteristic is liability to be legally acted for, and especially to have his domicil changed for him by the act of another person.

Under different legal systems, different classes of persons are dependent persons. Under English law the two classes which indubitably fall within the term as already explained are — first, minors; and, secondly, married women.³

¹ Such a person as is here described by the term independent person is often called, both by judges and text-writers, a person *sui juris*. This expression is borrowed from Roman law. It is a convenient one, but is purposely avoided on account of the difficulty of transferring without some inaccuracy the technical terms of one legal system to another. A reader, however, should bear in mind that, in reference to domicil, a person *sui juris* means, when the term is used, what is here called an independent person.

² Such a dependent person is often termed by judges and text-writers a person not *sui juris*; the term, though convenient, is avoided in these rules for the same reason for which the corresponding term person *sui juris* is not employed.

³ Lunatics are purposely not added. Their position in respect of capacity to effect a change of domicil is not free from doubt, but the better view seems to be that a lunatic's domicil cannot be changed by his committee. See comment on Rule 18, *post*.

Neither of these classes has the legal capacity to make a change of domicile, and both of these classes are liable to have it changed by the act of another person, who in the case of minors¹ is generally the father, and in the case of married women² is always the husband.

The term "liable" in the definition should be noticed. It covers the case of a person (such as an infant without living parents or guardians) of whom it cannot be said that there is at the moment any person on whom he is dependent, or who can change his domicile. The infant is, however, even then not an independent person in the sense in which the word is here used. He is legally incapable of changing his own domicile,³ and liable to have it changed (if at all) by the act of a person appointed guardian.⁴

(14) *An Immovable*, and (15) *A Movable*.

(i) The subjects of property are in general⁵ throughout this treatise divided into immovables and movables, and under the latter head are included all things which do not fall within the description of immovables.

Immovables are tangible things which cannot be moved, such as are lands and houses, whatever be the interest or estate which a person has in them. Hence the term includes what English lawyers call "chattels real," that is to say, land, etc., in which a person has less than a freehold interest, as for instance leaseholds.

Movables are, in the first place, such tangible things as can be moved, *e. g.*, animals, money, stock in trade, and in general terms goods; and, in the second place, "things" (using that word in a very wide sense indeed) which are the objects of a claim (*e. g.*, payment of money due from *X* to *A*), called by English lawyers "*choses in action*," in one of the senses⁶ of that ambiguous term.

It is convenient to group under the one head of movables, goods

¹ Rule 9, Sub-Rule 1, *post*.

² Rule 9, Sub-Rule 2, *post*.

³ Rule 10 and Sub-Rule, *post*.

⁴ *Pottinger v. Wightman*, 1817, 3 Mer. 67; *In re Beaumont*, [1893] 3 Ch. 490.

⁵ In some Rules, as for example those referring to administration, and in Rules which are intended to follow verbatim the words of an Act of Parliament, it is sometimes necessary to use to a limited extent the ordinary English division into realty and personalty, or real property and personal property.

⁶ *Chose in action* is used for —

- (i) the claim or right to a performance or service legally due from one man to another;
- (ii) the thing claimed, *e. g.*, the debt due;
- (iii) the evidence of the claim, *e. g.*, the bond on which a debt is due.

and *choses in action* (the objects of a legal claim), for neither class falls under the head of immovables, and each class is in many respects, as regards the conflict of laws, subject to the same rules. There is, however, this essential distinction between goods and *choses in action*, that goods have in fact a local situation, and *choses in action* (e. g., debts) have not. Hence, those Rules as to movables which depend upon an article having a real local situation, i. e., occupying a definite space, do not, except by analogy, apply to *choses in action*.¹

(ii) The division of the subjects of property into immovables and movables does not square with the distinction known to English lawyers between *things real*, or real property,² and *things personal*, or personal property.³

For though all things real are, with certain exceptions, included under immovables, yet some immovables are not included under things real; since "chattels real,"⁴ or, speaking generally, leaseholds, are included under immovables, whilst they do not, for most purposes, come within the class of realty, or things real.

On the other hand, while all movables are with certain exceptions included under things personal, or personalty, there are things personal, viz., chattels real, or, speaking generally, leaseholds, which are immovables, and are in no way affected by the Rules hereinafter laid down as to movables.

To put the same thing in other words, "immovables" are equivalent to realty, with the addition of chattels real or leaseholds; "movables" are equivalent to personalty, with the omission of chattels real.

(iii) Law is always concerned, in truth, not with things but with rights,⁵ and therefore not directly with immovables or movables, but with rights over, or in reference to, immovables or movables, or, to use popular language, with immovable property

¹ See Rule 141, *post*.

² See 1 *Steph. Comm.*, 12th ed., pp. 167, 168.

³ See 2 *Steph. Comm.*, 12th ed., p. 2.

⁴ Chattels real include estates for years, at will, and by sufferance. See 1 *Steph. Comm.*, 12th ed., pp. 272, 273.

⁵ See as to this point, and for an account of the different meanings of the word "property" *Williams, Real Property*, 17th ed., pp. 3, 4. What is particularly to be noted is that "property" in English law, as in ordinary language, means either (1) ownership in things, or (2) the things in which, or with regard to which, ownership may exist, or, to put the same thing more generally, property means either (i) rights legally capable of being exchanged for money, or (ii) the things (if any) which are the objects of such rights.

and movable property. It will serve to make clear the relation between the division into immovables and movables, and the division into realty and personalty, if we treat each as a division, not of the subject of property, but of the rights of which property from a legal point of view consists.

Immovable property includes all rights over things which cannot be moved, whatever be the nature of such rights or interests.

Movable property includes both rights over movable things or goods, and rights which are not rights over a definite thing, but are claims by one person against another (*e. g.*, the claim by *A* to be paid a debt due to him by *X*, or generally to the performance of a contract made with him by *X*), or in other words, which are *choses in action*.

Realty, looked at as a division of rights, includes all rights over things which cannot be moved, except chattels real.

Personalty, looked at as a division of rights, includes both rights over movables and *choses in action*, and further includes chattels real, or leaseholds.

Hence, immovable property is equivalent to realty, with the addition of chattels real; movable property is equivalent to personalty, with the omission of chattels real.

It is of consequence to notice the difference between movables and personal property, because judges, especially in the earlier cases on the conflict of laws, have occasionally used language which identifies movables with personal property,¹ and suggests the conclusion that all kinds of personalty, including leaseholds, are, as regards the conflict of laws (*e. g.*, in the case of intestate succession), governed by the rules which apply to movables properly so called. This doctrine has now been pronounced erroneous, and leaseholds (it has been decided) are, as regards the conflict of laws, to be considered of course as personalty, but also as immovables.²

(16) *Lex domicilii*. — What is the country in which a person is domiciled must be determined in accordance with the Rules

¹ See, *e. g.*, *Sill v. Worswick*, 1791, 1 H. Bl. 665, 690, judgment of Lord Loughborough; *Birtwhistle v. Vardill*, 1826, 5 B. & C. 438, 451, 452, judgment of Abbott, C. J.; *Forbes v. Steven*, 1870, L. R. 10 Eq. 178. Story habitually uses the terms personal property, personal estate, and the like, as meaning movables.

² *Freke v. Lord Carbery*, 1873, L. R. 16 Eq. 461; *In Goods of Gentili*, 1875, Irish Rep. 9 Eq. 541; *De Fogassieras v. Duport*, 1881, 11 L. R. Ir. 123. Compare *Duncan v. Lawson*, 1889, 41 Ch. D. 394.

hereinafter stated.¹ It may even here be remarked that domicil is a totally different thing from residence.

A French citizen is permanently settled in England, but is residing for a time at Paris. The law of his domicil is the law of England.

(17) *Lex loci contractus*. — The expression *lex loci contractus*, at any rate as used by English Courts, is ambiguous.

(1) It means the law of the country or place where a contract is made or entered into. This is the sense in which it is always employed in this Digest, and is also the sense in which it is generally employed in the earlier English cases on the conflict of laws.

(2) It often means the law by which the parties who make a contract intend it to be governed, — the law, in short, to which the contract is made subject, in accordance with the intention of the parties, or, as it is often called, the proper law of the contract.²

These two laws constantly do in fact coincide, that is, are one and the same law, as where *X* in London sells goods to *A*, to be delivered and paid for in London. But they need not coincide. A marriage contract, or settlement, is made in England between *X* and *A*, who are a Scotch man and woman domiciled in Scotland. It appears, either from the express terms or indirectly from the language of the instrument, that the contract is intended to be carried out in accordance with the law of Scotland. In such a case the *lex loci contractus*, in the first sense of that term (the sense in which the term is used in this Digest), is clearly the law of England; the *lex loci contractus*, in the second sense of that term, is as clearly the law of Scotland.³

(18) *Lex loci solutionis*. — *X* contracts in London to deliver goods to *A* in Italy. The *lex loci solutionis* is the law of Italy.

(19) *Lex situs*. — *X* leaves by will to *A* lands in England, money in France, and furniture in Italy.

The *lex situs*, as regards the land, is the law of England, as regards the money, the law of France, as regards the furniture, the law of Italy.⁴

¹ See Rules 1–19, *post*.

² See Rule 143, *post*.

³ See App., Note 2, *Preference of English Courts for lex loci contractus*. The *lex loci contractus*, in the sense in which it is used in this Digest, is merely one species of the *lex actus*, or the law of a place where a legal transaction takes place.

⁴ It may be well, though it is hardly necessary, to point out that the object of these examples is to illustrate the meaning of the *lex situs*; they are not intended to show what is the law applicable to the things in question. As a

(20) *Lex fori*. — This expression, it should be noted, always means the *local or territorial* law of the country to which a Court wherein the action is brought, or other legal proceedings are taken, belongs.

Hence the term excludes the application of any law other than the local law; and this is so whether the country referred to be England or a foreign country. If, for instance, the assertion be made in reference to England that the Courts, as to certain matters (*e. g.*, procedure), always follow the *lex fori*, or, in other words, the law of England, what is meant is that, when an action, etc., is brought in an English Court, every matter of procedure is determined in accordance with the ordinary local or territorial law of England, and that this is so, even though the case have in it a foreign element, as where an Italian brings in England an action against a Frenchman for the breach of a contract made in Germany. So again, if a similar assertion be made with reference to Italy, what is meant is that, when an action is brought in an Italian Court, every matter of procedure is determined according to the ordinary local or territorial law of Italy, and that this is so, even though the case have in it a foreign element, as where an Englishman brings in Italy an action against a Frenchman for the breach of a contract made in New York.

II. APPLICATION OF TERM "LAW OF COUNTRY."

In this Digest the law of a given country¹ (*e. g.*, the law of the country where a person is domiciled)

- (i) means, when applied to England, the local or territorial² law of England;
- (ii) means, when applied to any foreign country, any law, whether it be the local or territorial law of that country or not, which the Courts of that country apply to the decision of the case to which the Rule refers.³

matter of fact, succession to these things would be determined by an English Court, as regards the land, in accordance with the *lex situs*, but as regards the money and furniture, in accordance with the *lex domicilii*, of the testator.

¹ See as to the ambiguity of the term "law of a country," Intro., pp. 5-7, *ante*.

² See as to the meaning of local or territorial law, Intro., p. 6, *ante*.

³ This clause must of course be read subject to the definition of *lex fori*, under which such law always means local or territorial law.

Comment.

Law of country. — The term law of a country, *e. g.*, the law of England or the law of Italy, is, as already explained,¹ ambiguous.² It means in its narrower and most usual sense the territorial or local law of any country, *i. e.*, the law which is applied by the Courts thereof to the decision of cases which have in them no foreign element.³ It means in its wider sense all the principles or maxims, including, it may be, foreign law, which the Courts of a country apply to the decision of cases coming before them.

The Rules contained in this Digest state the principles according to which English Courts will determine what is the particular country, the law whereof is to be applied to the decision of a given case having in it any foreign element; these Rules, whether they lead to the application of English or of foreign law, are all Rules for the decision of cases coming before an English Court.

When these considerations are borne in mind, the varying meaning of the expression law of a country becomes intelligible.

(1) *When country England.* — When any Rule, applied to the circumstances of a given case, designates England as the country the law whereof is to determine the case, or, in other words, directs that the case be determined in accordance with the law of England, then the term "law of England" must mean the local or territorial law of England. If the term were used in a more general sense and meant the law or principle, whatever it might be, which an English Court would apply to the case, the Rule would constitute an unmeaning truism: for we are dealing with cases decided by an English Court, and it is clear from the nature of things that any case so decided must be determined in accordance with some law or principle which the English Court applies to it.⁴

Thus, Rule 180⁵ states (*inter alia*) that "the succession to the movables of an intestate is governed by the law of his domicil," *i. e.*, by the "law of the country" where he is domiciled, at the time of his death.

D, an intestate, dies domiciled in England. He is a French

¹ See Intro., p. 6, *ante*.

² So also are of course its equivalents, such as English law or Italian law, and terms of which it forms a part, such as *lex domicilii*, or "law of the country where a man is domiciled," or *lex situs*, or "law of the country where a thing is situate."

³ See Intro., p. 1, *ante*.

⁴ See Intro., pp. 2-4, *ante*.

⁵ See chap. xxx., *post*.

citizen resident in Italy. He leaves movables in England. Our Rule applied to the case designates England as the country in accordance with the law whereof his movables must be distributed, or in other words directs that his movables be distributed according to the local or territorial law of England, *i. e.*, in accordance with the Statute of Distribution. If by the law of England were, under these circumstances, meant some principle,¹ whatever it might happen to be, which the English Courts would apply to the case, the Rule would afford no guidance whatever.

(2) *When country is a foreign country.*—When any Rule applied to the circumstances of a given case designates a foreign country, *e. g.*, Italy, as the country the law whereof is to determine the case, or in other words directs that the case be determined in accordance with the law of Italy, then the term “law of Italy” means, unless the contrary is expressly stated, any principle or body of law which the Italian Courts hold applicable to the particular case. The Rule in effect directs that English Courts shall decide the case with reference to the law, whatever it be, according to which the Italian Courts would decide it.

Thus *D*, an intestate, dies domiciled in Italy. He is a French citizen resident in Italy. He leaves movables in England. Again apply Rule 180. The Rule applied to this case designates Italy as the country in accordance with the law whereof *D*’s movables must be distributed; it directs, that is to say, that his movables be distributed according to the law of Italy. But the expression “law of Italy” here means not necessarily the territorial law of Italy, but any law which the Italian Courts would apply to the decision of the particular case. This might be the territorial law of Italy, but it might be, as in fact it probably is,² the territorial law of France. However this be, the Rule is here not unmeaning. It states that English Courts will determine a case which obviously contains foreign elements, in accordance with the law, whatever it may be, which the Italian Courts hold applicable to the case.³

¹ See Intro., pp. 3, 4, *ante*.

² See *Codice Civile del Regno d’Italia*, Art. 7.

³ “When it is said that the law of the country of domicile must regulate the succession, it is not always meant to speak of the general law [*i. e.*, what has been called in this treatise the local or territorial law], but, in some instances, of the particular law which the country of domicile applies to the case of foreigners dying domiciled there, and which would not be applied to a natural-born subject of that country. Thus in *Collier v. Rivaz* [2 Curt. 855], the testator, an English-born subject, died domiciled in Belgium, leaving a will not executed according to the forms required by the Belgian law: “But by that law, the succession in such a case is not to be governed by the

"law of the country applicable to its natural-born subjects, but by the law of the testator's own country: And it was held [in England] that the will, being valid according to the law of England, ought to be admitted to probate." 1 *Williams Ex'rs*, 9th ed., p. 304; see also *Pechell v. Hildersley*, 1869, L. R. 1 P. & D. 673; *In Goods of Lacroix*, 1877, 2 P. D. 94. "The idea," it has been pointed out, "that the law of a particular country does not mean the ordinary law of the land, but the law which would be applied by [the Courts of] that country to a given case, — a view which is sufficiently familiar to English students of private international law, is by no means so well known in France." See *The Bourgoise Case in London and Paris*, by Malcolm Mollwraith, 6 L. Q. Rev. 379, 387 (n).

Two observations are worth making : —

1. The ambiguity in the expression "law of a country" would, for the purpose of this Digest, and indeed of private international law generally, cease to exist were all nations agreed on the principles governing the choice of law. Were this so, which is of course far from being the case, the term "law of a country" would always mean the territorial law of such country. Thus, if the Italian Courts agreed with the Courts of England in referring succession to movables wholly to the *lex domicilii*, the rule that succession to movables is governed by the law of the country where an intestate dies domiciled would mean that if he died domiciled in England, succession to his movables was governed by the territorial law of England, and that if he died domiciled in Italy, it was governed by the territorial law of Italy.

2. The illustrations given in the text of the meaning of the term "law of a country," when applied to England and to a foreign country respectively, refer to the *lex domicilii*, but the principle which they illustrate applies with one exception to every other class of law, *e. g.*, to the *lex situs*, or "law of a country where a thing is situate." The one exception is the *lex fori*. This by its very definition always means the local or territorial law of the country to which a Court wherein legal proceedings are taken belongs. See pp. 66, 75, *ante*.

CHAPTER II.

DOMICIL.¹

(A) DOMICIL OF NATURAL PERSONS.²

I. NATURE OF DOMICIL.

RULE 1.³ — The domicile of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law.

Comment and Illustrations.

No definition ⁴ of domicile has given entire satisfaction to English judges. As, however, a person's domicile may certainly be described as the place or country which is considered by law to be his home, and as a place or country is usually (though not invariably) "considered by law" (*i. e.*, by the Court) to be a person's home, because it is so in fact, light is thrown on the nature of

¹ *Story*, 7th ed., chap. iii. ss. 39-49 *c*; *Westlake*, chap. xiv., 3rd ed., pp. 284-322; *Foote*, chap. ii., 2nd ed., pp. 22-41; *Savigny*, ss. 350-355, Guthrie's transl., 2nd ed., pp. 86-114.

² For domicile of natural persons, *i. e.*, human beings, see Rules 1 to 18. For domicile of Legal Persons or Corporations, see Rule 19, *post*.

³ "Domicil meant permanent home, and if that was not understood by "itself, no illustration could help to make it intelligible." *Whicker v. Hume*, 1858, 28 L. J. (Ch.) 396, 400, per Lord *Cranworth*; *Attorney-General v. Rowe*, 1862, 31 L. J. (Ex.) 314, 320. See further as to the meaning of "home," pp. 80-84, *post*.

⁴ See App., Note 3, *Definition of Domicil*. For the purposes of private international law, the "place" within which it is required to determine a man's domicile is always, or almost always, a "country," in the sense in which the word has been hereinbefore defined. The words "place or" might, therefore, in strictness, be omitted from this Rule. It is, however, convenient to give a general description of domicile applicable to any place, whether it be a state, a country, a town, etc., within the limits whereof it may be desired to determine a person's domicile. (See further, pp. 90-93, *post*.)

domicil by a comparison between the meanings of the two closely connected terms, home and domicil.

Home. — The word "home" is not a term of art, but a word of ordinary discourse, and is usually employed without technical precision. Yet, whenever a place or country is termed, with any approach to accuracy, a person's home, reference is intended to be made to a connection or relation between two facts. Of these facts the one is a physical fact, the other a mental fact.

The physical fact is the person's "habitual physical presence," or, to use a shorter and more ordinary term, "residence,"¹ within the limits of a particular place or country. The mental fact is the person's "present intention to reside permanently, or for an "indefinite period," within the limits of such place or country; or, more accurately, the absence of any present intention² on his part to remove his dwelling permanently, or for an indefinite period, from such place or country. This mental fact is tech-

¹ The term "residence" is used by Westlake and others, as synonymous with the word "home," i. e., as including both "residence," in the sense in which the word is used in the text, and the "intention to reside" (*animus manendi*). To this use of the word residence there is in itself no objection, but there is great convenience in appropriating (as is done throughout this treatise) the substantive "residence" and the verb "reside" to the description of the physical fact which is included in, but does not make up the whole of, the meaning of the word "home." "Residence" has, in many instances, been employed by judges and others to denote a person's habitual physical presence in a place or country which may or may not be his home. (See, e. g., *Jopp v. Wood*, 1865, 34 L. J. (Ch.) 212, 218; *Gillis v. Gillis*, 1874, Irish Rep. 8 Eq. 597.) It is hoped, therefore, that the restriction of the term "residence" to this sense alone does not involve too wide a deviation from the ordinary use of language.

Though it is of little importance in which sense the words "residence" and "reside" are employed, it is of considerable importance that they should be used in one determinate sense. Confusion has sometimes arisen from the employment of the word residence at one time as excluding, and at another time as including, the *animus manendi*. Compare *Jopp v. Wood*, 1865, 34 L. J. (Ch.) 212; 4 De G. J. & S. 616, with *King v. Foxwell*, 1876, 3 Ch. D. 518.

The word "habitual," in the definition of residence, does not mean presence in a place either for a long or for a short time, but presence there for the greater part of the period, whatever that period may be (whether ten years or ten days), referred to in each particular case.

² See *Story*, s. 43, for the remark that the absence of all intention to cease residing in a place is sufficient to constitute the *animus manendi*. The difficulty of determining where it is that a person has his home, or domicil, arises in general from the difficulty, not only of defining, but of ascertaining, the existence of the very indefinite intention which constitutes the *animus manendi*. See *Attorney-General v. Pottinger*, 1861, 30 L. J. (Ex.) 284, 292, language of *Bramwell*, B.

nically termed, though not always with strict accuracy, the *animus manendi*,¹ or "intention of residence."

When it is perceived that the existence of a person's home in a given place or country depends on a relation between the fact of residence and the *animus manendi*, further investigation shows that the word home, as applied to a particular place, or country, may be defined or described in the following terms, or in words to the same effect.

Definition of home. — A person's home is that place or country, either (i) in which he, in fact, resides with the intention of residence (*animus manendi*),² or (ii) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence (*animus manendi*), or (iii) with regard to which, having so resided there, he retains the intention of residence (*animus manendi*), though he in fact no longer resides there.³

This definition or formula has undoubtedly a crabbed appearance. It, however, accurately describes all the circumstances or cases under which a given person, *D*,⁴ may, with strict accuracy, be said to have a home in a particular country, *e. g.*, England, or, in other words, in which England can be termed his home, and excludes the cases in which England cannot with accuracy be termed his home. The first clause of the formula or definition describes the conditions under which a home is acquired. The second and third clauses describe the conditions under which a home is retained. The meaning and effect of the whole definition is most easily seen from examples of the cases in which, under it, a country can, and a country cannot, be considered *D*'s home.

The cases to which the formula can be applied are six.

(1) *D* is a person residing in England, without any intention of leaving the country for good, or of settling elsewhere. England is clearly *D*'s home. His position is in fact the position of every

¹ It is often, in strictness, rather the *animus revertendi et manendi* than the *animus manendi*.

² The term *animus manendi*, or intention of residence, is intended to include the negative state of mind, which is more accurately described as "the absence of any present intention not to reside permanently in a place or country."

³ More briefly, a person's "home" is "that place or country in which either he resides, with the intention of residence (*animus manendi*), or in which he has so resided, and with regard to which he retains either residence or the "intention of residence."

⁴ *D* is, throughout this chapter, used to designate the person, either whose domicile is in question, or upon whose domicile a legal right depends, or may be supposed to depend.

ordinary inhabitant. There exists in his case exactly that combination of residence and of purpose to reside required by the first clause of the definition. The time for which his residence may have lasted is immaterial. A person may have resided in a country for a month, for a year, or for ten years; it may have been his residence for a longer or a shorter period; but from the moment when there exists the required combination of residence and intention to reside permanently (*animus manendi*), the country is his home, or, in popular language, he has his home in the country.¹

(2) *D*, an inhabitant of England, who has hitherto intended to continue residing there, makes up his mind to settle in France. His home, however, continues to be English till the moment when he leaves the country. It is till then retained by the fact of residence, though the *animus manendi* has ceased to exist. *D* intends to abandon, but until he leaves the country, has not actually abandoned England as his home. This is the case of an intended change of home, which has not actually been carried out. It falls within the second clause of the definition of home.

(3) *D* is an inhabitant of England, who has for years intended to live permanently in England. He goes to France for business or pleasure, with the intention of returning to England, and residing there permanently. England is still his home. It is so, because the intention of residence (*animus manendi*) is retained, although *D*'s actual residence in England has ceased.

The case falls precisely within the third clause of the definition of home.

(4) *D* has never, in fact, resided, and has never formed any intention of permanently residing, in England. That *D*, under these circumstances, does not possess an English home is too clear for the matter to need comment.²

The case is one which obviously does not fall within, and is, in fact, excluded by, the definition already given of a home.

(5) *D*, who has been permanently residing in France, is for the moment in England, but has never formed the least intention of permanent residence there, being a traveller who has come to

¹ See, as to the relation of time of residence to domicile, comment on Rule 17, *post*. "It may be conceded that if the intention of permanently residing 'in a place exists, residence in that place, however short, will establish a domicile.'" *Bell v. Kennedy*, 1868, L. R. 1 Sc. App. 307, 319, per Lord *Chelmsford*.

² The one apparent exception to this remark is the case of children and others, who have the home of some person, *e. g.*, a parent, on whom they depend. The explanation is that such persons are considered as sharing the home of the person on whom they depend, rather than in strictness possessing a home of their own. See Rule 9 and Sub-Rules 1 and 2, *post*.

England for a time to see the country. He clearly has not, either in strictness or in accordance with ordinary notions, a home in England, and it is also clear that his case does not fall within the terms of the definition.

(6) *D*, lastly, is a person who has been permanently residing in France, but has formed an intention of coming to England, where he has not been before, and settling there. He has not yet quitted France. England clearly is not his home, and the case is one manifestly excluded from the terms of the definition.¹

From our formula, as illustrated by these examples, the conclusion follows that, as a home is acquired by the combination of actual residence (*factum*) and of intention of residence (*animus*), so it is (when once acquired) lost, or abandoned, only when *both* the residence *and* the intention to reside cease to exist. If, that is to say, *D*, who has resided in England as his home, continues either to reside there in fact, or to retain the intention of residing there permanently, England continues to be his home. On the other hand, if *D* ceases both to reside in England and to entertain the intention of residing there permanently, England ceases to be his home, and the process of abandonment is complete. If, to such giving up of a home by the cessation both of residence and of the *animus manendi*, we apply the terms "abandon" and "abandonment," the meaning of the word home may be defined with comparative brevity.

A "home" (as applied to a place or country) means "the place or country in which a person resides with the *animus manendi*, or intention of residence, or which, having so resided in it, he has not abandoned."

This definition or description of a home, in whatever terms it is expressed, gives rise to a remark which will be found of considerable importance. This is that the conception of a place or country as a home is in no sense a legal or a technical idea, since it arises from the relation between two facts, "actual residence" and "intention to reside," neither of which has anything to do with the technicalities of law. A person might have a home in a place where law and Courts were totally unknown, and the question whether a given place is or is not to be considered a particular

¹ Cases (4), (5), and (6) are, it may be said with truth, simply cases (1), (2), and (3) looked at, so to speak, from the other side. The six cases or examples, however, describe the six different relations in which a person may stand in respect of residence and *animus manendi* towards a given country, and are each worth observing in reference to questions which may arise as to domicil.

person's home is in itself a mere question of fact, and not of law.¹

It is worth while to insist on the non-legal, or natural character of the notion signified by the word "home," because from the definition of a home, combined with knowledge of the ordinary facts of human life, flow several conclusions which have a very close connection with the legal rules determining the nature, acquisition, and change of domicile.

Results of definition of "home." — Of these results, flowing from the definition of a home, considered merely as a natural fact, without any reference to legal niceties or assumptions, the following are the principal: —

First. The vast majority of mankind (in the civilised parts of the world, at least) have a home, since they generally reside in some country, *e. g.*, England or France, without any intention of ceasing to reside there. It is nevertheless clear (if the thing be looked at merely as a matter of fact, without any reference to the rules of law) that a person may be homeless.² There may be no country of which you can at a given moment with truth assert that it is in fact *D*'s home.

D, for example, may be an English emigrant, who has left England for good, but is still on his voyage to America, and has not yet reached Boston, where he intends to settle. He has lost his home in England; he has not gained a home in America. He is in the strictest sense homeless. Here the residence which is the basis of a home does not exist. *D*, again, may be a traveller, who has abandoned his English home, with the intention of travelling from land to land, for an indefinite period, and with the fixed purpose of never returning to England. In this case also *D* is homeless. He has no home, because he does not entertain that intention of residence, which goes to make up the notion of a home. *D*, again, may be a vagabond, *e. g.*, a gipsy who wanders from country to country, without any intention of permanently residing in any one place. Here, again, *D* is homeless, because of the total want of any *animus manendi*.³

In these (and perhaps in some other) instances a person is as a matter of fact homeless, and if, as we shall find to be the case,⁴ he

¹ For the bearing of this remark on the law of domicile, see comment on Rule 7, *post*; *In re Tootal's Trusts*, 1883, 23 Ch. D. 532; and *Westlake*, 3rd ed., pp. 287-299.

² Contrast Rule 2, p. 94, *post*, as to domicile.

³ See for these cases of homelessness, *Savigny*, s. 354, *Guthrie's transl.*, 2nd ed., p. 107.

⁴ See Rule 2, p. 94, *post*.

is considered by law to have a home in one country, rather than in another, or, in other words, if he has a domicile, this is the result of a legal convention or assumption. He acquires a home not by his own act, but by the operation of law.

Secondly. The definition of home suggests the inquiry, which has, in fact, been sometimes raised in the Courts,¹ whether a person can have more than one home at the same time, or, in other words, whether each of two or more countries can at the same moment be the home of one and the same person?

The consideration of what is meant by "home" shows that (if the matter be considered independently of all legal rules) the question is little more than one of words.

The following state of facts certainly may exist. *D* determines to live half of each year in France and half in England. He possesses a house, lands, and friends, in each country. He resides during each winter in his house in the south of France, and spends each summer in his house in England. His intention is to pursue the same course throughout his life. He entertains, in other words, the intention of continuing to reside in each country for six months in every year.

If the question be asked whether *D* has two homes, the answer is that the question is mainly one of language. If the intention entertained by *D* to reside in each country be not a sufficient *animus manendi* as to each, then *D* is to be numbered among the persons who in fact have no home. If it be a sufficient *animus manendi*, then *D* is correctly described as having two homes.²

Thirdly. The abandonment³ of one home may either coincide with, or precede, the acquisition of a new home. In other words, abandonment of one home may be combined with settlement in another home, or else may be the simple abandonment of one home without the acquisition of another.

D, for example, goes from England, where he is settled, to France on business. At the moment of leaving England, and on his arrival in France, he has the fullest intention of returning thence to England, as his permanent residence. This purpose continues for the first year of his residing in France. *D*, there-

¹ See Rule 3, p. 95, *post*.

² The question raised, though almost a verbal one, has given some trouble to writers on domicile. They have here as elsewhere somewhat confused a question of fact and a question of law, and have occasionally failed to distinguish the question of fact, whether *D* can independently of legal rules have two homes, from the legal question, whether it is or is not a rule of law that a man cannot have more than one domicile.

³ See Rule 8, *post*.

fore, though living in France, still retains his English home. At the end of the year, he makes up his mind to reside permanently in France. From that moment he acquires a French, and loses his English home. The act of acquisition and the act of abandonment exactly coincide. They must, from the nature of the case, be complete at one and the same moment.

The act of abandonment, however, often precedes the act of acquisition. *D* leaves England with the intention of ultimately settling in France, but journeys slowly to France, travelling through Belgium and Germany. From the moment he leaves England, his English home is lost, since from that moment he gives up both residence and intention to reside in England, but during his journey no French home is acquired, for, though he intends to settle in France, residence there cannot begin till France is reached. The relation between the abandonment of one home and the acquisition of another deserves careful consideration, for two reasons.

The first reason is, that the practical difficulty of deciding in which of two countries a person is at a given moment to be considered as domiciled arises (in general) not from any legal subtleties, but from the difficulty of determining at what moment of time a person resolves to make a country, in which he happens to be living, his permanent home. The nature of this difficulty is well illustrated by a reported case. The question to be determined was, whether *D*, who at one time possessed a home in Jamaica, had or had not in the year 1838 acquired a home in Scotland. No one disputed that in 1837 he had left Jamaica for good and was residing in Scotland. It was further undisputed that some years later than 1838 he had acquired a Scotch home or domicile. The matter substantially in dispute was whether at the date in question *D* had made up his mind to reside permanently in Scotland. The case came on for decision in 1868, and *D* himself gave evidence as to his own intentions in 1838. His honesty was undoubted, but the Court, though having the advantage of *D*'s own evidence, found the question of fact most difficult to determine, and in the result took a different view (chiefly on the strength of letters written in 1838) from that taken by *D* himself of what was then his intention as to residence.¹

The second reason is, that there exists a noticeable difference between the natural result of abandonment and the legal rule²

¹ *Bell v. Kennedy*, 1868, L. R. 1 Sc. App. 307. Compare *Craigie v. Hewitt*, [1892] 3 Ch. (C. A.) 180.

² See Rule 8, *post*.

as to its effect. As a matter of fact, a person may abandon one home without acquiring another. As a matter of law, no man can abandon his legal home or domicile without, according to circumstances, either acquiring a new or resuming a former domicile.

Fourthly. From the fact that the acquisition of a home depends upon freedom of action or choice, it follows that a large number of persons¹ either cannot, or usually do not, determine for themselves where their home shall be. Thus, young children cannot acquire a home for themselves; boys of thirteen or fourteen, though they occasionally do determine their own place of residence, more generally find their home chosen for them by their father or guardian; the home of a wife is usually the same as that of the husband; and, speaking generally, persons dependent upon the will of others have, in many cases, the home of those on whom they depend. This is obvious, but the fact is worth notice, because it lies at the bottom of what might otherwise appear to be arbitrary rules of law, *e. g.*, the rule that a wife can in no case have any other domicile than that of her husband.²

Domicil not same as home. — As a person's domicile is the place or country which is considered by law to be his home, and as the law in general holds that place to be a man's home which is so in fact, the notion naturally suggests itself that the word "domicil" and the word "home" (as already defined) mean in reality the same thing, and that the one is merely the technical equivalent for the other.

¹ See Rule 9, and Sub-Rules, *post*.

² From an examination into the meaning of the word "home," when it is strictly employed, we can trace the connection between the word when used with accuracy and its application in various lax or metaphorical senses.

In all cases there exists a more or less distinct reference to the ideas of residence and intention to reside. Thus, when a lodger says he is "going home" to his lodging, the place where he lives is certainly not a permanent residence. Still, the speaker intends to look upon it for the moment in the character of a more or less permanent abode.

A colonist, again, calls England his home. In the mouth of the original settler the expression may perhaps have been used at first with accuracy, and have been an assertion of his intention to return and reside in England (*animus revertendi*).

He or his children continue to use the expression when no real intention to return any longer exists. What is then meant is that the speaker entertains towards England the sentiments which a person is supposed to entertain towards the land which is in reality his home.

In these and like instances may be traced a transition from inaccurate statement of fact to the use of conscious metaphor. What is worth notice is that the ideas of "residence" and of "intention to reside" are not entirely absent from even the metaphorical uses of the word "home."

"It has occurred to me," says Baron Bramwell, ". . . whether 'one might not interpret this word 'domicil' by substituting the 'word 'home' for it — not home in the sense in which a man who 'has taken a lodging for a week in a watering-place might say he 'was going home, nor home in the sense in which a colonist, born 'in a colony, intending to live and die there, might say he was 'coming home, when he meant coming to England; but using the 'word 'home' in the sense in which a man might say, 'I have no 'home; I live sometimes in London, sometimes in Paris, sometimes in Rome, and I have no home.'"¹

The notion, however, expressed in the passage cited is fallacious. This idea, that the word home means, when strictly defined, the same thing as the term domicil, is based on the erroneous assumption that the law always considers that place to be a person's home which actually is his home, and on the omission to notice the fact that the law in several instances attributes to a person a domicil in a country where in reality he has not, and perhaps never had, a home. Thus the rule that a domiciled Englishman, who has in fact abandoned England without acquiring any other home, retains his English domicil,² or the principle that a married woman is always domiciled in the country where her husband has his domicil, involves the result that a person may have a domicil who has no home, or that a woman may occasionally have her domicil in one country, though she has her real home in another. A person, further, may reside and intend to reside, and therefore in fact have his home, in a country, though on account of the character of the country English Courts may refuse to treat it as his domicil. Thus an Englishman who resides at Shanghai with the intention of residing there permanently, and without any idea of returning to England, dies at Shanghai. He has at the moment of his death a home in China, but he dies not with a Chinese, but with an English domicil.³ An attempt, therefore, to obtain a complete definition of the legal term domicil by a precise definition of the non-legal term home can never meet with complete success, for a definition so obtained will not include in its terms the conventional or technical element which makes up part of the meaning of the word domicil.⁴

¹ *Attorney-General v. Rowe*, 1862, 31 L. J. (Ex.) 314, 320, per *Bramwell*, B.

² See Rule 8, *post*.

³ *In re Tootal's Trusts*, 1883, 23 Ch. D. 532, with which compare *Abd-ul-Messih v. Farra*, 1888, 13 App. Cas. 431.

⁴ This conclusion is confirmed by an examination of the received definitions of domicil. They are all, or nearly all, definitions of a domicil of choice, i. e., a domicil acquired by the party's own act, and do not include the cases in

The question may naturally occur to the reader, why is it that the term domicile should not be made to coincide in meaning with the word home, or, in other words, why is it that the Courts consider in some instances that a place is a person's home which is not so in fact?

The answer is as follows: It is for legal purposes of vital importance that every man should be fixed with some home or domicile, since otherwise it may be impossible to decide by what law his rights, or those of other persons, are to be determined. The cases, therefore, of actual homelessness must be met by some conventional rule, or, in other words, a person must have a domicile or legal home assigned to him, even though he does not possess a real one. It is, again, a matter of great convenience that a person should be treated as having his home or being domiciled in the place where persons of his class or in his position would, in general, have their home. The law, therefore, tends to consider that place as always constituting a person's domicile which would generally be the home of persons occupying his position. Thus the home of an infant is generally that of his father, and the home of a wife is generally that of her husband. Hence the rule of law assigning to an infant, in general, the domicile of his father, and to a married woman, invariably, the domicile of her husband.

These considerations of necessity or of convenience introduce into the rules as to domicile that conventional element which makes the idea itself a technical one and different from the natural conception of home. As these conventional rules cannot be conveniently brought under any one head, there is a difficulty in giving a neat definition of domicile as contrasted with home. Since, however, the Courts generally hold a place to be a person's domicile because it is in fact his permanent home, though occasionally they hold a place to be a person's domicile because it is fixed as such by a rule of law, a domicile may accurately be described in the terms of our Rule, and we may lay down that a person's domicile is in general the place or country which is in fact his permanent home, though in some cases it is the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law.

Comparison of home and domicile.—The word home denotes a merely natural and untechnical conception, based upon the rela-

which domicile is imposed (independently of the party's choice) by a rule of law; but a "domicil of choice" is nearly, or all but, equivalent to the word "home." As to domicile of choice, see Rule 7, *post*. See also App., Note 3, *Definition of Domicil*.

tion between a person's residence and his intention as to residence. The term domicile is a name for a legal conception, based upon, and connected with, the idea of home, but containing in it elements of a purely legal or conventional character. Whether a place or country is a man's home is a question of fact. Whether a place or country is a man's domicile is a question of mixed fact and law, or rather of the inference drawn by law from certain facts, though in general the facts which constitute a place a man's home are the same facts as those from which the law infers that it is his domicile.

Area of domicile. — One remark which is applicable both to home and domicile deserves attention, and has reference to what we may term the "place," or "area," of domicile.

The description given in this treatise of a "home,"¹ as also the definition of "domicil"² (for in this point they need not be distinguished), suits, it will be observed, any "place" whatever its limits, and applies equally well to a house or to a country. Thus if *D* resides at No. 1, Regent Street, with the intention of permanently residing in that house, the definition of home suits that house no less than it suits England, and if any legal result were to depend upon *D*'s living at No. 1, Regent Street, rather than in Westminster, the definition of domicile would apply to No. 1, Regent Street, as being the place which is considered by law to be *D*'s home. It will also be observed that, though the words home and domicile, as used in this treatise, are applicable to any place whatever, yet the "place" obviously contemplated throughout the Rules relating to domicile is a "country" or "territory subject to one system of law."³ The reason for this is that, though the maxims for the determination of a person's domicile are in principle equally applicable, whatever the area or the extent of the place within which a person's domicile is to be determined, the main object of this treatise, in so far as it is concerned with domicile, is to show how far a person's rights are affected by his having his legal home or domicile within a territory governed by one system of law, *i. e.*, within a given country, rather than within another. When once his domicile in a given country is determined, the question within what part of that country (or law district) he is domiciled becomes, for the purpose of this treatise, immaterial. To decide whether *D* has his legal home in England is important, because upon that fact depends whether certain of his rights are or are not affected by English law. To determine whether *D* has his legal home in Middlesex or in Surrey is, for

¹ See p. 81, *ante*.

² See Rule 1, p. 79, *ante*.

³ See pp. 66, 67, *ante*.

the purpose of this treatise, unimportant, since in either case he comes within the operation of the same system of law.

If, indeed, it happened that one part of a country, governed generally by one system of law, was in many respects subject to special rules of law, then it might be important to determine whether *D* was domiciled within such particular part, *e. g.*, Brittany, of the whole country, France; but in this case, such part would be *pro tanto* a separate country, in the sense in which that term is employed in these Rules.

It may, indeed, be suggested that the two inquiries, whether *D* is domiciled in England, and whether *D* has his domicile or home in a particular place or house in England, are inevitably connected, because England cannot be *D*'s domicile unless he has a home, or is assumed by law to have a home, at some particular place, or in some particular house, in England. This suggestion rests on the idea that a person cannot be domiciled in a country unless he has a domicile at some particular place in that country. This notion, however, is (it is conceived) erroneous.¹

It is, of course, obvious that if *D* has a home or domicile in one particular place in a country, he is domiciled in that country, *e. g.*, England, and within any wider area or territory including that country, *e. g.*, the United Kingdom; it is also clear that in this case the reason why *D* is known to be domiciled in England is that he is known to have a home at some definite place in England, *e. g.*, No. 1, Regent Street, where he resides with the intention of residing in that house permanently; but though the fact of a person having a domicile in one part of England establishes for certain and is in general the ground on which you know that he is domiciled in England, the converse does not hold good. *D* may reside in England, with the full intention of residing permanently in England, and may therefore be domiciled there, and this fact may be well known, and capable of proof, and yet there may be no one place in England which can be termed *D*'s home, or domicile, within the terms of our definition.² This has been thus laid down, by a Scotch judge:—

“I cannot admit what Lord Fullerton assumes to be the rule, that, in order to make a domicile, it is necessary to have some particular spot within the territory of a law—that it is not enough that the party shall have an apparently continual residence there, but shall actually have a particular spot, or remain

¹ Conf. *Doucet v. Geoghegan*, 1878, 9 Ch. D. (C. A.) 441, especially judgment of Brett, L. J., p. 457.

² For definition of “home,” see p. 81, *ante*.

"fixed in some permanent establishment. In considering the "*indicia* of domicile these things are important; but they are not necessary, as matters of general law, to constitute domicile. Many old bachelors never have a house they can call their own. They go from hotel to hotel, and from watering-place to watering-place, careless of the comfort of more permanent residence, and unwilling to submit to the *gêne* attendant on it. There was the case of a nobleman who always lived at inns, and would have no servants but waiters; but he did not lose his domicile on that account.

"If the purpose of remaining in the territory be clearly proved *aliter*, a particular home is not necessary."¹

¹ *Arnott v. Groom*, Court of Session Cases, 1846, 9 D. 142, p. 150, per Lord Jeffrey. The fact, however, that a person has no one place at which he permanently resides in England may be evidence of his not having the intention to reside permanently in England, and therefore of his not intending to make England his home. "It appears to me," says Chitty, J., "that I must take into consideration the nature and character of the residence, and it appears that the intestate in this case was moving about *England*, and I think his shifting about from place to place shows a fluctuating and unsettled mind; and that the fact of residence, although for twenty-two years, standing alone without any other circumstances to show the intention, is insufficient to warrant me in coming to the conclusion that he intended to make *England* his home. . . . It would be difficult to say that he had any home in *England*, although . . . it may be considered that, if there was an intention shown by any other acts on his part, such as the purchase of land . . . or any other circumstance, even a slight circumstance, then I should have been warranted in coming to a different conclusion. But as the facts stand, I cannot say that . . . this retired old soldier did intend finally to throw off his Scotch domicile and to make himself, or rather his succession, for that is the only point of any materiality, subject to the law of *England*." *In re Patience*, 1885, 29 Ch. D. 976, 984, per Chitty, J. This language is not absolutely inconsistent with, but is on the whole opposed to, the doctrine of Lord Jeffrey in *Arnott v. Groom*. The last words (it is submitted) of Mr. Justice Chitty's judgment must not be understood as laying down that if *A* was domiciled in England, anything depended upon his intention as to succession. The intention as to residence fixes his domicile, but his domicile being once fixed, the law thereof fixes the rules of succession independently of the intestate's intention. See also *Bradford v. Young*, 1885, 29 Ch. D. (C. A.) 617.

Westlake apparently agrees with the view taken in the text that a man may be domiciled in a country without having his domicile at any particular place therein. "Domicil," he writes, "being necessarily connected either with law or with jurisdiction, or with both, must always be in a territory, though it need not be in any particular spot in the territory. It may be in England, but need not be at York or the like; it may be in India, but need not be at Calcutta or the like." *Westlake*, 3rd ed., p. 298, s. 243. See also, *In re Bullen Smith*, 1888, 58 L. T. 578, and, above all, *Craignish v. Hewitt*, [1892] 3 Ch. (C. A.) 180.

The principle laid down in the passage cited is of importance. For if many of the received and best definitions of domicile be adopted, and the unnecessary assumption be also made that a person who is domiciled in a country must be necessarily domiciled at some definite place in that country, the result will follow that persons whom every one will admit to have an English domicile cannot be shown to be domiciled in England.

Take, for example, Story's definition of the term domicile, viz., "that place in which a person's habitation is fixed without any present intention of removing therefrom,"¹ and apply it to the following case: *D* is a Frenchman, settled for years in England, but living in lodgings at Manchester. His full intention is to live permanently in England, but he has no intention of residing more than a limited time in Manchester. His intention may be to spend his life successively in different parts of England, or his purpose may be to go after six months to London, and occupy a house there (which he has already bought) for the rest of his life. Under these circumstances, there is no one place in England which is his home or domicile. Manchester is not his home, because though he resides there, he has not, and never had, as regards Manchester, any intention of permanent residence. No other place in England is his home, because though he may intend to reside in London, he has not begun to reside there in fact. The solution of the difficulty, which might in fact arise with reference, *e. g.*, to the disposition of *D*'s property, if he were to die before leaving Manchester, is that though not domiciled at any one place in England, he has an English domicile, since, with regard to England, there exists on *D*'s part both residence and the *animus manendi*.²

¹ Story, s. 43. See *Doucet v. Geoghegan*, 1878, 9 Ch. D. (C. A.) 441. In this case the testator certainly was domiciled in England, for he "had the intention of residing in England permanently," but it can hardly be said that he was domiciled in his house in London, which he took on a lease for three years.

² The fact which should be constantly kept in mind is, that domicile may be defined for different purposes with reference to different areas, and further, that a person may have a full intention of residence as to one place or area, and not as to any narrower place or area within it. In other words, *D* may have the fullest intention of residing permanently in France or England, but may not have an intention of residing permanently in London or Paris. The question as to the place or area within a country to which a person's intention of residence applies may conceivably become of importance. Thus *D*, a Frenchman, resides at Strasburg in 1870, and goes abroad without any intention of abandoning France as his home. He dies immediately after the cession of Strasburg to Germany. The question (presuming that the Treaty of Cession

RULE 2.¹—No person can at any time be without a domicile.

Comment.

“It is a settled principle that no man shall be without a domicile.”² “It is clear that by our law a man must have some domicile,”³ or (to use the expression of another authority) “it is undoubted law that no man can be without a domicile.”⁴

The principle here laid down is, in effect, that for the purpose of determining a person's legal rights or liabilities, the Courts will invariably hold that there is some country in which he has a home, and will not admit the possibility of his being in fact homeless,⁵ or, in other words, even if he is in fact homeless, a home will, for the purpose of determining his legal rights, or those of other persons, always be assigned to him by a presumption or fiction of law. The mode by which this result is achieved will appear from Rules laid down in this chapter.⁶ It consists for the most part in the assumption that every one for whom no other domicile can be found retains what is called his domicile of origin,⁷ *i. e.*, the domicile assigned to him by a rule of law at the time of his birth, combined with the principle that a domicile is retained until it is changed by the act of the domiciled person himself, or in some cases by the act of a person on whom he is dependent.⁸

made no provision for such cases) might arise as to whether *D*'s domicile were French or German at the date of his death. The question ought, according to the principles maintained by the English Courts, to be determined with reference to *D*'s intention. If, on the one hand, it were known that he intended to leave Strasburg, though not to abandon France, his domicile would be French. If, on the other hand, it were known that he intended to reside permanently at Strasburg, his domicile might be maintained to be German. The very question whether a person could be domiciled in a country, without being domiciled in any particular place in it, was, through the separation of Queensland from New South Wales, nearly raised in *Platt v. Attorney-General of New South Wales*, 1878, 3 App. Cas. 336, but was not definitely decided.

¹ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 453, 457; *Bell v. Kennedy*, 1868, L. R. 1 Sc. App. 307.

² *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 457, per Lord Westbury.

³ *Ibid.*, p. 448, per Hatherley, C.

⁴ *Ibid.*, p. 453, per Lord Chelmsford.

⁵ See as to the principle that not only has a person always a home, but that his home can always be ascertained, Rule 12, *post*.

⁶ See Rules 4–18, *post*.

⁷ See Rule 6, p. 101, *post*.

⁸ Rules 4, 8, and 9, *post*.

RULE 3.¹—Subject to the exception hereinafter mentioned, no person can have at the same time more than one domicile(?).²

Comment and Illustrations.

“It is clear that, by our law, a man must have some domicile, and must have a single domicile.”³

The Courts, when called upon to determine rights, *e. g.*, of succession, depending on *D*'s domicile at a given time, will assume as a rule of law that *D* was at the time in question domiciled in some one country only.

Thus the question, who is to succeed to *D*'s property, as far as its decision depends upon the law of *D*'s domicile, will always be determined with reference to the law of one country alone. If it be doubtful whether *D* was at his death domiciled in England or in Scotland, the minutest evidence will be weighed in order to settle in which of the two countries he had his legal home, but our Courts will always decide that he died domiciled in one country only, and will not admit the possibility of his dying domiciled in two countries.

Question. — *Can a person have different domicils for different purposes?*

It is clear that no man can for the same purpose, *i. e.*, when the determination of one and the same class of rights is in question, be taken to have a domicile in more countries than one at the same time.

A doubt has, however, been raised, whether a person cannot have at the same moment a domicile in one country for the determination of one class of rights (*e. g.*, rights of succession), and a domicile in another country for the determination of another class of rights (*e. g.*, capacity for marriage).

“I apprehend,” says Pollock, C. B., “that a peer of England, who is also a peer of Scotland, and has estates in both countries,

¹ In support of this Rule, see *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 448; *Somerville v. Somerville*, 1801, 5 Ves. 750; 5 R. R. 155; and note especially the absence of any case in which a person has been held to have more than one domicile at the same time. But see contra, *In re Capdevielle*, 1864, 33 L. J. (Ex.) 306; 2 H. & C. 985; *Croker v. Marquis of Hertford*, 1844, 4 Moore P. C. 339.

According to Savigny, a person may have more than one domicile (*Savigny*, s. 354, Guthrie's transl., 2nd ed., p. 107). See for a discussion of the whole subject, *Phillimore*, ss. 51–60.

² A doubtful Rule or statement in Digest is marked with a query.

³ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 448, per *Hatherley*, C.

"who comes to Parliament to discharge a public duty, and returns
 "to Scotland to enjoy the country, is domiciled both in England
 "and Scotland. A lawyer of the greatest eminence, formerly a
 "member of this Court, and now a member of the House of Lords,
 "to whose opinion I, in common with all the profession, attach the
 "greatest importance, once admitted to me that for some purposes
 "a man might have a domicile both in Scotland and England. I
 "cannot understand why he should not."¹

"The facts and circumstances," writes Phillimore, "which
 "might be deemed sufficient to establish a commercial domicile in
 "time of war, and a matrimonial, or forensic, or political domicile
 "in time of peace, might be such as, according to English law,
 "would fail to establish a testamentary or principal domicile.
 "'There is a wide difference,' it was observed in a judgment
 "delivered in a recent case before the Judicial Committee of the
 "Privy Council, 'in applying the law of domicile to contracts and
 "'to wills.'"²

If the notion suggested by these authorities be correct, Rule 3
 must be modified, and run : —

"No person can, *for the same purpose*, have at the same time
 more than one domicile."

The Rule, however, as it stands, is probably correct. The
 notion that a person may be held in strictness to have been domiciled
 in Scotland for the purpose of determining the validity of
 his will, and to have been domiciled at the same moment in Ger-
 many for the purpose of determining the validity of his marriage
 (in so far as that depends upon domicile), is opposed to the prin-
 ciples by which the law of domicile is governed, and is not, it is
 believed, supported by any decided case.

The prevalence of the notion is due to two causes : —

First. The term "domicil" is often used in a lax sense,
 meaning no more than is meant by the term "residence," as
 used in this treatise. Thus, a "forensic domicile," or a "com-
 mercial domicile,"³ often signifies something far short of domi-
 cil, strictly so called. Now, it is obvious that a person may have
 a "residence" in one place and a "domicil" in another,⁴ and

¹ *In re Capdevielle*, 1864, 33 L. J. (Ex.) 306, 316, per *Pollock*, C. B. Com-
 pare *Somerville v. Somerville*, 1801, 5 Vesey, 749 a, 786; 5 R. R. 161, per
Arden, M. R.

² *Phillimore*, s. 54; *Crocker v. Marquis of Hertford*, 1844, 4 Moore P. C.
 339.

³ See App., Note 4, *Commercial domicile in time of war*.

⁴ *Gillis v. Gillis*, 1874, Ir. L. R. 8 Eq. 597.

that residence may often be sufficient to confer rights, or impose liabilities.¹ It is from cases in which "residence" alone has been in question that the possibility of contemporaneous domicils in different countries for different purposes has suggested itself. Thus, *D*, though domiciled in France, can, if present in England, be sued in our Courts. This fact has been expressed by the assertion that *D* has a forensic domicil in England, — an expression which certainly countenances the notion that *D* is for one purpose domiciled in England and for another in France. A forensic domicil, however, means nothing more than such residence in England as renders *D* liable to be sued; the co-existence, therefore, of a forensic domicil in one country, and of a full domicil in another, is simply the result of the admitted fact that a person who resides in England may be domiciled in France, and does not countenance the idea that *D* can in strictness be at one and the same moment domiciled both in France and in England.

Secondly. The inquiry, which of two countries is to be considered a person's domicil, has (especially in the earlier cases) been confused with the question, whether one person can at the same time have a domicil in two countries.²

D is a Scotchman. He has a family estate in Scotland. He purchases a house and marries in England, where he generally lives with his wife. He, however, visits Scotland every summer, and goes to his estate there during the shooting season.

On his death in England intestate, a question arises as to the succession to *D*'s movable property.³

The question must be decided with reference to the law of Scotland, or of England, according to the view taken of *D*'s domicil.

The decision depends on a balance of evidence. Probably if there are no other circumstances than those stated, the Courts will hold him domiciled in England.⁴

Exception. — A person within the operation of the Domicile Act, 1861, 24 & 25 Vict. cap. 121, may possibly have one domicil for the purpose of testate or intestate succession, and another domicil for all other purposes.

¹ *E. g.*, to the payment of income tax. *Attorney-General v. Coote*, 1817, 4 Price, 183; 16 & 17 Vict. cap. 34, s. 2. See App., Note 17, *Limits of Taxation, etc.*

² See *Forbes v. Forbes*, 1854, 23 L. J. (Ch.) 724; Kay, 341.

³ Rule 180, *post*.

⁴ See *Forbes v. Forbes*, 1854, 23 L. J. (Ch.) 724; Kay, 341; compared with *Aitchison v. Dixon*, 1870, L. R. 10 Eq. 589.

Comment and Illustrations.

The Domicile Act, 1861, empowers the Crown to make with any foreign state a convention to the effect that no British subject resident at the time of his death in the foreign country to which the convention applies, and no subject of such country resident at the time of his death in the United Kingdom, shall be deemed, for the purposes of testate or intestate succession to movables, to have acquired a domicile in the country where he dies, unless he has fulfilled the requirements as to making a written declaration of his intention to become there domiciled, and otherwise, of the Act. This enactment, apparently, applies only to domicile for the purposes of testate or intestate succession, and does not affect a person's domicile for other purposes.

If a convention were made under the Act,¹ *e. g.*, with France, a case such as the following might arise.

D, a British subject, who has been domiciled in England, becomes resident and (except in so far as the matter is affected by the Act) acquires a domicile in France. He has not fulfilled the requirements of the Domicile Act, 1861. He dies in France whilst there resident. A question arises as to succession to *D*'s movables.² He will be deemed for this purpose not to have acquired a French domicile, but to have retained his English domicile.

A question also arises as to the legitimacy of *D*'s child,³ born in France, after *D*'s acquisition of a French domicile.

This question must probably be decided on the view of *D*'s being domiciled in France.

D, therefore, will be held for one purpose to have had an English, and for another to have had a French, domicile at the same time.

RULE 4. — A domicile once acquired is retained until it is changed

(1) in the case of an independent person,⁴ by his own act;

¹ No convention has been made under the Act, which is, therefore, at present a dead letter.

The terms "foreign" and "country" used in the Act have not the precise sense given to these terms in this Digest.

² See chap. xxx., *post*.

³ See Rule 134, *post*.

⁴ See for meaning of term, pp. 69 to 71, *ante*.

- (2) in the case of a dependent person,¹ by the act of some one on whom he is dependent.

Comment and Illustrations.

The principle here enunciated may (it being granted that no one can have more than one domicile) appear too obvious to need statement, but requires to be attended to, as it lies at the bottom of most of the rules as to the acquisition and change of domicile.

D is in possession of an English domicile. This domicile he will retain until some act is done, on the part of the person capable of changing it, which amounts to the legal acquisition or resumption by *D* of another domicile.

If *D* is a man of full age, then the person capable of changing his domicile is *D* himself, and *D* will retain his English domicile until some act on his own part which has the legal effect of changing it for, *e. g.*, a French domicile.²

If *D* is a minor, the person capable of changing *D*'s domicile is the person on whom *D* is, for this purpose at any rate, dependent, who in most instances is *D*'s father. *D* retains his domicile until some act on the part of his father changes it. The only act, it may even here be added, which can have that effect is a change in the father's own domicile.³

II. ACQUISITION AND CHANGE OF DOMICIL.

*Domicil of Independent Persons.*⁴

RULE 5. — Every independent person has at any given moment either

- (1) the domicile received by him at his birth (which domicile is hereinafter called the domicile of origin),⁵ or,

¹ See for meaning of term, pp. 69 to 71, *ante*.

² As to the mode in which one domicile can be changed for another, and the difference in this respect between the domicile of origin and a domicile of choice, see Rule 8, *post*.

³ See Rule 9, Sub-Rule 1, *post*.

⁴ See for meaning of term, pp. 69 to 71, *ante*.

⁵ See Rule 6, p. 101, *post*. The expression domicile of origin, though borrowed from Roman law, has a different sense from the expression *domicilium originis*. *Savigny*, ss. 351, 352, *Guthrie's transal.*, 2nd ed., pp. 88-96.

- (2) a domicile (not being the same as his domicile of origin) acquired or retained¹ by him while independent by his own act (which domicile is hereinafter called a domicile of choice).²

Comment and Illustrations.

Every independent person, which term includes every man or (unmarried) woman, of full age, has at any given moment of his life either the same domicile as that which he received at birth, technically called the domicile of origin, or a different domicile which he has acquired when of full age, by his own act and choice, technically called a domicile of choice.

The fact to be noticed is, that an independent person cannot, by any possibility, be at any time without one or other of these domiciles. If he is at any moment not in possession of his domicile of origin, he is in possession of a domicile of choice. If he is at any moment not in possession of a domicile of choice, then he is at that moment in possession of his domicile of origin. That this is so results from the rule of law that any person *sui juris*, who at any moment has no other domicile, is assumed to be in possession of his domicile of origin.³

D's domicile of origin is, we will suppose, English. What the rule lays down is, that *D*, being an independent person, will at any moment be found to be domiciled either in England, or in some other country, such as France, in which he has settled, or acquired for himself a home.⁴ It is of course possible (as before pointed out)⁵ that *D* may be in fact homeless, as where he has left England for good, and has not yet settled in France, or where, having settled in France, he has left France for good and is on his way to America; but under these circumstances he has

¹ The word "retained" is inserted to cover the case of a person who on coming of age is in possession of a domicile, not being that of origin, which was acquired for him by his father during infancy. *D* is born in England, where his father, *A*, is then domiciled. During *D*'s infancy his father acquires or resumes a French domicile, and when *D* comes of age, is domiciled in France. *D*'s domicile at the moment of his coming of age is French, and is retained as a domicile of choice until *D* does some act whereby he changes his domicile.

² See Rule 7, *post*.

³ Compare Rule 8, *post*.

⁴ Rule 3, p. 95, *ante*, precludes the possibility of *D*'s being domiciled both in England and in France.

⁵ See p. 84, *ante*.

his domicile or legal home in England,¹ i. e., he is legally in possession of his domicile of origin.

The two domicils differ from each other in two respects: first, in their mode of acquisition;² and secondly, in the mode in which they are changed.³

Domicil of Origin.

RULE 6.⁴ — Every person receives at (or as from) birth a domicile of origin.

- (1) In the case of a legitimate child born during his father's lifetime, the domicile of origin of the child is the domicile of the father at the time of the child's birth.⁵
- (2) In the case of an illegitimate⁶ or posthumous⁷ child, the domicile of origin is the domicile of his mother at the time of his birth.
- (3) In the case of a foundling, the domicile of origin is the country where he is born or found.⁸
- (4) In the case of a legitimated person, the domicile of origin is (probably) the domicile which his father had at the time of such person's birth (?).⁹

Comment and Illustrations.

Every person is held by an absolute rule, or fiction, of law to be at birth domiciled, or to have his legal home, in the country in

¹ See Rule 8, *post*.

² See Rules 6 and 7, *post*.

³ See Rule 8, *post*.

⁴ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 450, 457; *Munroe v. Douglas*, 1820, 5 Madd. 379; *Forbes v. Forbes*, 1854, 23 L. J. (Ch.) 724; Kay, 341; *Dalhousie v. McDouall*, 1840, 7 Cl. & F. 817; *Munro v. Munro*, 1840, 7 Cl. & F. 842; *Re Wright's Trusts*, 1856, 2 K. & J. 595; 25 L. J. (Ch.) 621; *Somerville v. Somerville*, 1801, 5 Ves. 749 a, 786, 787; 5 R. R. 155; *In re Goodman's Trusts*, 1881, 17 Ch. D. (C. A.) 266; *Vaucher v. Solicitor to Treasury*, 1888, 40 Ch. D. (C. A.) 216; *Story*, s. 46; *Westlake*, 3rd ed., pp. 299–302; *Phillimore*, ss. 67–69, 211–228; *Savigny*, ss. 353, 354, pp. 97–109.

⁵ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441; *Dalhousie v. McDouall*, 1840, 7 Cl. & F. 817.

⁶ *Re Wright's Trusts*, 1856, 2 K. & J. 595; 25 L. J. (Ch.) 621; *Urquhart v. Butterfield*, 1887, 37 Ch. D. (C. A.) 357; *Westlake*, 3rd ed., p. 300, ss. 246, 247.

⁷ See *Westlake*, 1st ed., p. 35, and compare *Jacobs, Law of Domicil*, s. 105.

⁸ *Westlake*, 3rd ed., p. 300, s. 248.

⁹ Compare, however, *Westlake*, 3rd ed., p. 300, ss. 246, 247.

which, at the time of the infant's birth, the person (in most cases the infant's father) on whom the infant is legally dependent is then domiciled.

As to this domicile of origin, the following points require notice:

First. The existence of a "domicil of origin" must be considered a fiction or assumption of law.

"The law of England and of almost all civilised countries ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilised nations. It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother, if illegitimate."¹

The aim of the fiction which assigns to every one from the moment of his birth a domicile of origin is to insure that no man shall be at any moment without a legal home² in some country, according to the laws of which country his legal rights may be, in many respects, determined; but the rule that a child has from the moment of his birth the domicile of his father is clearly based upon fact, since an infant's home is, generally speaking, the home of his father.

¹ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 457, per Lord Westbury. It should be noticed that the opinion of foreign jurists and (to a certain extent) the enactments of foreign codes tend to do away with the distinction between domicile and nationality by making a person's civil, no less than his political, rights depend not on his domicile but on his nationality or allegiance. See especially, *Codice Civile del Regno d' Italia*, Art. 6.

² See for cases of homelessness in fact, p. 84, *ante*.

Secondly. The domicile of origin, though received at birth, need not be either the country in which the infant is born, or the country in which his parents are residing, or the country to which his father belongs by race or allegiance. "I speak," says an eminent judge, "of the domicile of origin rather than of birth. I find no authority which gives, for the purpose of succession, any effect to the place of birth. If the son of an Englishman is born upon a journey, his domicile will follow that of his father. The domicile of origin is that arising from a man's birth and connections;"¹ *i. e.*, it is fixed by the domicile of the parent at the time of the child's birth. Thus *D*, the son of an Englishman and a British subject, is born in France, where his father is residing for the moment though domiciled without being naturalised in America. *D*'s domicile of origin is neither English nor French, but American.

(1) *Case of a Legitimate Child.* — A legitimate child born during his father's lifetime has his domicile of origin in the country where the infant's father is domiciled at the moment of the child's birth, for "the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate."²

A legitimate child, for example, is born at Boulogne at a moment when his father is domiciled in Scotland. The child's domicile of origin is Scotch.

(2) *Case of Illegitimate³ or Posthumous⁴ Child.* — Such a child has for his domicile of origin the domicile of his mother at the time of his birth.

D is an illegitimate child born in France at a time when his father, an Englishman, is domiciled in England, and his mother, a Frenchwoman, is domiciled in France. *D*'s domicile of origin is not English but French.⁵

D is a posthumous child, whose father was domiciled at the time of death in England. At the time of *D*'s birth his mother has acquired a domicile in France. *D*'s domicile of origin is French.⁶

(3) *Case of a Foundling.* — *D* is a foundling, *i. e.*, a child whose parents are unknown. He is found in Scotland. His domicile of origin is Scotch.⁷

¹ *Somerville v. Somerville*, 1801, 5 Vesey, 749 a, 786, 787; per Arden, M. R.

² *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 457, per Lord Westbury.

³ *Westlake*, 3rd ed., p. 300.

⁴ *Westlake*, 1st ed., p. 35.

⁵ *Re Wright's Trusts*, 1856, 25 L. J. (Ch.) 621; 2 K. & J. 595.

⁶ *Westlake*, 1st ed., p. 35.

⁷ This is really rather a result of rules of evidence than a direct rule of law. See Rules 12 and 13, pp. 131, 132, *post*.

(4) *Case of a Legitimated Person.*—A person born illegitimate, but afterwards legitimated, *e. g.*, by the subsequent marriage of his parents,¹ stands (after his legitimation) in the position which he would have occupied had he been born legitimate. His domicile of origin is, therefore, apparently the country where his father was domiciled at the time of the legitimated person's birth.

The domicile of origin, however, of a legitimated person is, it must be admitted, open to doubt. The reported cases throw little direct light on the point under consideration, and it may be that even though a child on legitimation takes, if still under age, the domicile of his father, yet his *domicil of origin* remains that of the legitimated person's mother at the time of his birth.²

D is the child of a Scotch father and an Englishwoman, who are unmarried at the time of his birth. At that moment the domicile of his father is Scotch and of his mother English. A year or two afterwards, whilst his father is still domiciled in Scotland, *D*'s parents marry. *D*'s domicile of origin probably becomes Scotch, though it may possibly remain English. His actual domicile certainly becomes Scotch, and during minority changes with the domicile of his father.³

Domicil of Choice.

RULE 7.⁴—Every independent person can acquire a domicile of choice, by the combination of residence (*factum*), and intention of permanent or indefinite residence (*animus manendi*), but not otherwise.

¹ See as to *legitimatio per subsequens matrimonium*, Rule 134, *post*.

² For a criticism on the rule laid down in Rule 6, clause 4, see *Jacobs, Law of Domicil*, s. 105, note 14. *Westlake*, 3rd ed., p. 300, s. 247, is compatible with either view as to a legitimated person's domicile of origin.

³ Compare *Urquhart v. Butterfield*, 1887, 37 Ch. D. (C. D.) 357. See Rule 9, Sub-Rule 1, clause 1, p. 120, *post*. *Vaucher v. Solicitor to Treasury*; *In re Grove*, 1888, 40 Ch. D. (C. A.) 216.

⁴ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 457, 458; *Bell v. Kennedy*, 1868, L. R. 1 Sc. App. 307, 450; *Collier v. Rivaz*, 1841, 2 Curt. 855; *Maltass v. Maltass*, 1844, 1 Rob. Eco. 67, 73; *Forbes v. Forbes*, 1854, 23 L. J. (Ch.) 724; *Kay*, 341; *Haldane v. Eckford*, 1869, L. R. 8 Eq. 631; *Hoskins v. Matthews*, 1856, 25 L. J. (Ch.) 689; 8 De G. M. & G. 13; *Jopp v. Wood*, 1865, 34 L. J. (Ch.) 212; 4 De G. J. & S. 616, 621, 622; *Story*, s. 44; *Westlake*, ss. 37-40; *Phillimore*, ss. 203-210.

Comment and Illustrations.

It will be convenient to consider separately the meaning of, and the authorities for, first, the affirmative, secondly, the negative portion of this Rule.

(i) *Mode of acquisition.*

Acquisition by residence and intention of residence. — Every person begins life as a minor, and therefore as a dependent person. When he becomes an independent person (which can in no case happen before he attains his majority),¹ he will find himself in possession of a domicile,² which will in most cases be his domicile of origin,³ but may be a domicile acquired by the act of the person on whom he is dependent during infancy.

He can then obtain or retain for himself by his own act and will a legal home, or domicile different from the domicile of origin, and called a domicile of choice. This domicile is acquired by the combination of residence, and the intention to reside, in a given country.

"It may," it has been said, "be conceded that if the intention 'of permanently residing in a place exists, a residence in pursuance of that intention will establish a domicile.'"⁴ The process by which this new domicile is acquired has been thus aptly described. "A change of [the domicile of origin] can only be 'effected *animo et facto* — that is to say, by the choice of another 'domicile evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends. [A person] 'in making this change does an act which is more nearly designated by the word 'settling,' than by any one word in our language. Thus we speak of a colonist settling in Canada, or

¹ It may happen later, *e. g.*, in the case of a woman who marries while a minor, and becomes a widow late in life. The age of majority is fixed by English law at 21. By other laws, at other periods, *e. g.*, by Prussian law at 25. A question may arise, as to which no English decision exists, whether a Prussian of 22 will be considered by the English Courts as capable of acquiring a domicile at the age of 21. It may be conjectured that the answer to this inquiry depends, in part at least, on the law of the country where he acquires a domicile. He might be held capable of acquiring an English domicile. A question may also arise as to the domicile of an infant widow. Most probably it is the domicile of her deceased husband at the time of his death.

² See Rules 9 and 11, pp. 119 and 125, *post*.

³ If it is not, it becomes immediately his domicile of choice by the process of acquisition described in the text.

⁴ *Bell v. Kennedy*, 1868, L. R. 1 Sc. App. 307, 319, per Lord Cranworth.

"Australia, or of a Scotsman settling in England, and the word "is frequently used as expressive of the act of change of domicile, "in the various judgments pronounced by our Courts."¹ The acquisition, in short, of a domicile of choice is nothing more than the technical expression for settling in a new home or country, and therefore involves the existence of precisely those conditions of act and intention which we have seen to be requisite for the acquisition of a home.²

"The only principle which can be laid down as governing all "questions of domicile is this, that where a party is alleged to have "abandoned his domicile of origin, and to have acquired a new "one, it is necessary to show that there was both the *factum* "and the *animus*. There must be the act, and there must be the "intention."³

"A new domicile is not acquired until there is not only a fixed "intention of establishing a permanent residence in some other "country, but until also this intention has been carried out by "actual residence there."⁴

¹ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 449, per Lord *Chelmsford*.

² It may, therefore, be thought that the term "domicil of choice" is exactly equivalent to the ordinary expression "home," as already defined (see p. 81, *ante*), but this is not the case. A domicile of choice is always a home, but a home is not always a domicile of choice. For the domicile of origin, being imposed by a rule of law, is never considered as a domicile of choice; though as a matter of fact a person's domicile of origin is, in most instances, a person's actual home. So again a person's real home may not, in the eye of the law, be his domicile of choice, since he may be a person who, though in fact capable of choosing a home for himself, is legally incapable of such choice. Thus minors or married women often do choose homes for themselves, but as they are considered by law incapable of such choice, the home they have in fact chosen is not legally their domicile of choice.

Though again the legal conditions necessary for the acquisition of a domicile of choice are, in substance, the same as the conditions necessary for the acquisition of a home, these conditions are, for legal purposes, defined with technical precision. The legal theory further, that every one has a domicile of origin, which is, so to speak, presumably his home, leads to the result that the law requires stronger proof of deliberate intention to acquire a new domicile than would be demanded by any person who, without reference to legal rules, wished to determine whether *D* had or had not left England and settled in Australia; and generally the Courts, in judging whether a man has acquired a domicile of choice, look more to intention, and less to length of residence, than would popular judgment in inquiring whether he had acquired a new home. Thus it can hardly be doubted either that the decision in *Bell v. Kennedy* (L. R. 1 Sc. App. 307) is legally correct or that it is opposed to ordinary notions. A lay-man would probably have held that Mr. Bell had settled in Scotland.

³ *Cockrell v. Cockrell*, 1856, 25 L. J. (Ch.) 730, 731, per *Kindersley*, V. C.

⁴ *Bell v. Kennedy*, 1868, L. R. 1 Sc. App. 307, 319, per Lord *Chelmsford*.

It is, in short, admitted in general terms that "the question of domicile is a question of fact and intention."¹

Particular attention, therefore, is due to the nature both of the requisite fact, viz., "residence," and of the requisite "intention."

(i) *Residence*. — The nature of residence considered as a part of domicile, and thus looked at as a physical fact, independently of the *animus manendi*, has been little discussed.² It may be defined (as already suggested) as "habitual physical presence in a place or country." The word "habitual," however, must not mislead. What is meant is not presence in a place or country for a length of time, but presence there for the greater part of the time, be it long or short, which the person using the term "residence" contemplates.

The residence which goes to constitute domicile certainly need not be long in point of time. "If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile."³

The residence must, however, be in pursuance of, or influenced by, the intention. Mere length of residence will not of itself constitute domicile. *D*, a Scotchman, born in Scotland, never leaves England during the last twenty-two years of his life. *D*, however, has never exhibited the intention of settling in England. *D*, therefore, at death retains his Scotch domicile.⁴

This characteristic, however, in common with other qualities which are generally ascribed to residence, concerns not the physical fact of residence, but the mental fact of the choice, purpose, or intention to reside (*animus manendi*).

(ii) *Intention*. — The main problem in determining the nature of domicile,⁵ in so far as it depends upon choice, consists in defining the character of the necessary intention or *animus*. The difficulty lies partly in the nature of the thing itself, partly in the different views which Courts and writers have at different times

¹ *Attorney-General v. Kent*, 1862, 31 L. J. (Ex.) 391, 393, per *Wilde*, B. See also, *Collier v. Rivaz*, 1841, 2 Curt. 855; *Maltass v. Maltass*, 1844, 1 Rob. Ecc. Rep. 67.

² It may be well to note again that residence is often used as including the *animus manendi*, and hence as equivalent to home or domicile. See, e. g., *King v. Foxwell*, 1876, 3 Ch. D. 518, 520, for expressions of *Jessell*, M. R., as to residence, where the term is probably used as including the *animus manendi*; see p. 80, note 1, *ante*. For the difference between residence and domicile, see *Walcot v. Botfield*, 1854, Kay, 534, 543, 544.

³ *Bell v. Kennedy*, 1868, L. R. 1 Sc. App. 307, 319, per Lord *Cranworth*.

⁴ *In re Patience*, 1885, 29 Ch. D. 976. Conf. *Bradford v. Young*, 1885, 29 Ch. D. (C. A.) 617.

⁵ See App., Note 3, *Definition of Domicil*.

entertained, as to the nature and definiteness of the requisite intention or purpose. The best definition or description of the requisite *animus* appears to be, "the present intention of permanent or indefinite residence in a given country," or (if the same thing be expressed more accurately, in a negative form) "the absence of any present intention of not residing permanently or indefinitely in a given country."¹

There exists no authoritative definition of the *animus manendi* necessary to the acquisition of a domicile of choice, but there are four points as to its character which deserve notice.

First. The intention must amount to a purpose or choice.

The "domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place."² It must not be "prescribed or dictated by any external necessity."³ "In order that a man may change his domicil of origin he must choose a new domicil — the word 'choose' indicates that the act is voluntary on his part; he must choose a new domicil by fixing his sole or principal residence in a new country (that is, a country which is not his country of origin), with the intention of residing there for a period not limited as to time."⁴

The expression that the residence must be "voluntary," or a matter of choice, is not in itself a happy one⁵ since, supposing a person to make up his mind to settle in a country for an indefinite time, the "motive," whether it be economy, pleasure, or even considerations of health,⁶ is indifferent, though certainly the residence would not in some of these cases be termed, in ordinary language, a matter of choice. What, however, is intended to be expressed,

¹ For the substance of this description, see *Story*, s. 43, and compare the language of *Cairns*, Ch., in *Bell v. Kennedy*, 1868, L. R. 1 Sc. App. 307, 318. See also judgment of *Martin*, B., *Attorney-General v. Kent*, 1862, 31 L. J. (Ex.) 391, 395, 396.

² *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 458, per Lord Westbury.

³ *Ibid.*

⁴ *King v. Foxwell*, 1876, 3 Ch. D. 518, 520, per Jessell, M. R. Conf. *Briggs v. Briggs*, 1880, 5 P. D. 163.

⁵ The words "voluntary" or "voluntarily" may easily mislead. Conf. *Urguhart v. Butterfield*, 1887, 37 Ch. D. (C. A.) 357; *In re Marrett*, 1887, 36 Ch. D. (C. A.) 400, especially judgment of *Cotton*, L. J., p. 407.

⁶ See *Hoskins v. Matthews*, 1856, 25 L. J. (Ch.) 689; 8 De G. M. & G. 13, compared with the expressions of Lord Westbury in *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 458, which seem to imply that a domicil of choice must not be dictated by a desire for "relief from illness." See as to domicil of invalids when abroad, comment on Rule 18, *post*. A person may change his domicil, though his object in doing so is to defeat his creditors. *In re Robertson*, W. N. 1885, p. 217.

and is undoubtedly true is, that the residence must be connected with the distinct purpose, or intention, to reside. In this sense, therefore, there must be a residence of "choice." The mere fact, in other words, of residence, however prolonged, has no effect on the acquisition of domicile, unless the residence is in consequence of an intention to reside. Hence, — to take a familiar example, — residence in a country, arising from sudden illness, as when *D*, domiciled in England, falls ill on a journey through France, and is delayed there from week to week, does not entail a change of domicile.

How far this intention or choice must be distinct or conscious is still an open question.

Some judges have held that it is not necessary, in order to establish a domicile, that a person should have absolutely made up his mind which of two countries is the place where he intends to make his permanent home.

"One word," says Bramwell, B., "with regard to the intention. [The counsel for the defendant] says, and I think he errs there, that [*D*] did not intend to remain in England, because he contemplated that he might possibly go back to India. I think there is a very common mistake made in such cases, which is the assumption that a man must absolutely intend one of two things, for it may be that he has no absolute intention of doing either. It may be that [*D*] did not contemplate the case at all arising of an opportunity of going back to India. So that, if he had been suddenly appealed to upon the subject, he might have said, 'I have never thought of it.' I think, however, it appears here that he had contemplated the possibility of returning to India. But is it to be said that a contingent intention of that kind defeats the intention which is necessary to accompany the *factum*, in order to establish a domicile? Most assuredly not. There is not a man who has not contingent intentions to do something that would be very much to his benefit if the occasion arises. But if every such intention or expression of intention prevented a man having a fixed domicile, no man would ever have a domicile at all, except his domicile of origin."¹

Others have laid down that a somewhat more distinct intention must exist. "It must," it has been said, "be shown that the intention required actually existed, or made reasonably certain that it would have been formed or expressed if the question

¹ *Attorney-General v. Pottinger*, 1861, 30 L. J. (Ex.) 284, 292, per Bramwell, B.

"[whether a person intended to change his domicile] had arisen in a form requiring a deliberate or solemn determination."¹

The difference of view, however, is not, after all, great. The question about the degree of definiteness of purpose which is needed refers rather to the evidence than to the nature of the intention.

*Secondly. The intention must be an intention to reside permanently, or for an indefinite period.*²

It must be, that is to say, not an intention to reside for a limited time or definite purpose, but "an intention of continuing to reside for an unlimited time."³

If, for example, *D*, domiciled in England, goes to America for six months, or to finish a piece of business, or even with the intention of staying there only until he has made a fortune,⁴ he retains his English domicile. Thus, a residence in a foreign country for twenty-five years⁵ will not change a person's domicile in default of the intention of settling permanently or indefinitely in such foreign country; but it is, of course, "true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case, as soon as the change of purpose, or *animus manendi*, can be inferred, the fact of domicile is established."⁶ If *D*, who goes to America, intending to stay there for a limited period, after living there for a year or two, makes up his mind to reside there permanently, he at once acquires an American domicile.

¹ *Douglas v. Douglas*, 1871, L. R. 12 Eq. 617, 645, per *Wickens*, V. C.

² It is maintained by a Scotch writer (*Fraser, Husband and Wife*, 2nd ed., p. 1265) that a person cannot change his domicile unless he has the intention to change his civil status. This contention is, however, according to English law, erroneous, for it is clear that if *D* leaves England for good and takes up his residence in France with the intention of residing there permanently, he will, by our Courts, be held to have acquired a French domicile, and this, even though he may wish to retain his status as an English citizen; nor is it easy to see how, on any view, a change of domicile can be made to depend on the intention to change a person's civil status. Most people, on leaving one country to reside in another, do not, in fact, either contemplate or understand the effect of such residence on their civil status. The doctrine, in short, that a change of domicile cannot be effected without the intention to make a change of status, appears to be only a slightly different form of the doctrine deliberately rejected by the House of Lords, that a person cannot change his domicile unless he intends *quatenus in illo exuere patriam*.

³ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 458, per Lord Westbury; *The Lauderdale Peerage Case*, 1885, 10 App. Cas. 692.

⁴ *Jopp v. Wood*, 1864, 34 L. J. (Ch.) 212; 4 De G. J. & S. 616. See, however, *Doucet v. Geoghegan*, 1878, 9 Ch. D. 441.

⁵ *Ibid.*

⁶ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 458, per Lord Westbury.

Thirdly. The intention must be an intention of abandoning, i. e., of ceasing to reside permanently in, the former domicile.

"The intention must be to leave the place where the party has acquired a domicile, and to go to reside in some other place as the new place of domicile, or the place of new domicile."¹ Indeed, if it be granted that a man can have but one domicile at the same time,² it necessarily follows that the purpose, or *animus*, requisite for acquiring a domicile in France must exclude the purpose requisite for retaining a domicile in England.

*Fourthly. The intention need not be an intention to change allegiance.*³

The intention to reside permanently in a country is not the same thing as the intention or wish to become a citizen of that country.

It was, indeed, at one time held that a man could not change his domicile, for example, from England to the United States, without doing at any rate as much as he could to become an American citizen. He must, as it was said, "intend *quatenus in illo exuere patriam*."⁴ But this doctrine has now been pronounced erroneous by the highest authority;⁵ and when an Englishman leaves England where he is domiciled, and goes to the United States, he changes his domicile if he intends to settle in the new country and to establish his principal or sole and permanent home there, even though the legal consequences of his so doing may never have entered his mind;⁶ and though he may have had no intention of becoming an American citizen, and has remained a British subject to the end of his life.⁷

(ii) *No other mode of acquisition.*

The concurrence of residence and intention, for however short a time, is essential for the acquisition of a domicile.

¹ *Lyall v. Paton*, 1856, 25 L. J. (Ch.) 746, 749, per *Kindersley*, V. C.

² See Rule 3, p. 95, *ante*.

³ See, however, p. 102, note 1, *ante*.

⁴ *Moorhouse v. Lord*, 1863, 32 L. J. (Ch.) 295, 298; 10 H. L. C. 272, 283, per Lord *Cranworth*, followed by *In re Capdevielle*, 1864, 33 L. J. (Ex.) 306; 2 H. & C. 985; *In re Grove*, *Vaucher v. Solicitor to the Treasury*, 1888, 40 Ch. D. (C. A.) 216. Compare, however, *Westlake*, 3rd ed., pp. 302-310.

⁵ See *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441; *Brunel v. Brunel*, 1871, L. R. 12 Eq. 298.

⁶ See especially, *Douglas v. Douglas*, 1871, C. R. 12 Eq. 617, 643, 644, judgment of *Wickens*, V. C.

⁷ *Brunel v. Brunel*, 1871, L. R. 12 Eq. 298.

"We are all agreed," it has been said, "that to constitute a domicile, there must be the fact of residence . . . and also a purpose on the part of [*D*] to have continued that residence. While I say that both must concur, I say it with equal confidence that nothing else is necessary."¹

"Residence" alone clearly will not suffice.

This is sufficiently apparent from the ordinary case of persons travelling, or living abroad, who retain a domicile in a country they may not have seen for years.²

"Intention" alone will not suffice.

D, who has never resided in Australia, will clearly not acquire a domicile there by the mere intention to reside there.

Nor will the fact that *D* has set forth from England on his voyage to Australia give him an Australian domicile until he arrives there.³

This must be noticed, because it was at one time thought⁴ that a new domicile could be acquired *in itinere*, i. e., that if *D* left England, intending to settle, e. g., in Australia, he acquired an Australian domicile the moment he quitted England.⁵ But this notion is apparently erroneous, and the principle may probably be taken as established, that a domicile of choice can be acquired by nothing short of the concurrence of residence and intention.

From the fact that the acquisition of a domicile of choice depends solely on the co-existence of residence and intention to reside, two important results may be deduced.

First. A person's wish to retain a domicile in one country will not enable him to retain it if, in fact, he resides with the *animus manendi* in another.

D, an Englishman, originally domiciled in England, resided at Hamburgh with the intention of living there for an indefinite period. He wished, however, to retain his English domicile, and coming for a temporary purpose to England, made a will there,

¹ *Arnott v. Groom*, 1846, 9 D. 142, 149-152, per Lord Jeffrey. Compare *Collier v. Rivaz*, 1841, 2 Curt. 855, 857, per Sir H. Jenner Fust. See also, *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 450.

² See further for cases where there is no change of domicile, because there is residence without the *animus manendi*, comment on Rule 18, *post*.

³ Westlake holds that if in this case England were *D*'s domicile of choice, the leaving England with the intention of permanent residence in Australia would suffice to give *D* an Australian domicile before he arrived in Australia. *Westlake*, 3rd ed., pp. 311, 312, ss. 259, 260.

⁴ See expressions of Leach, V. C., in *Munroe v. Douglas*, 1820, 5 Madd. 379, 405.

⁵ See further, Rule 8, p. 114, *post*.

in which he declared his intention not to renounce his English domicile of origin. He then returned to Hamburg, and continued living there with the *animus manendi* till his death. *D* had at the time of his death a domicile at Hamburg and not in England.¹

"I consider," says Pollock, C. B., "the declaration of the testator as meaning that he intended to go back to Hamburg to live and die there, though it was not his intention of never coming to England again. Probably he wished for two domicils. But in spite of a lurking desire to return to England, his acts show an intention to live and die at Hamburg, and that is not affected by the declaration. . . . That being so, he *could not help giving up* his English domicile."² "The testator," adds Bramwell, B., "does not say that he had no intention of remaining at Hamburg during his life, but only that *he wished to retain his English domicile. That he could not do.*"³

*Secondly. The acquisition of a domicile cannot be affected by rules of foreign law.*⁴

By the law of some countries, *e. g.*, of France, a person is required to fulfil certain legal requirements before he is considered by the French Courts to be at any rate fully domiciled in France, but if a person in fact resides with the *animus manendi* in France (*i. e.*, is really settled in France), he will be considered by our Courts to be domiciled there, even though he has not complied with the requirements of French law.

D, an English peer, lives in France, and as a matter of fact intends to pass the rest of his life in France. He wishes, how-

¹ *Re Steer*, 1858, 3 H. & N. 594; 28 L. J. (Ex.) 22.

² *Ibid.*, 3 H. & N. p. 599.

³ *Ibid.*

⁴ But the legal effect to be given to the domicile acquired will depend upon the law of the country where the person in question is domiciled. Thus if *D* dies domiciled in France, though without having obtained the authorisation required by the *Code Napoleon*, Art. 13, the descent of his movable property in case of intestacy, or the validity of his will of movables in case he leaves a will, will be determined by the rules which French Courts would apply to the case of a person who, though resident in France, has not obtained the necessary authorisation. This I conceive to be the meaning of Westlake's statement: "If an establishment be made in any country in such manner that by English law it would fix the domicile there, still no effect which the law of that country does not allow to it can be allowed to it in the character of domicile in England. In other words, no one can acquire a personal law in the teeth of that law itself." *Westlake*, 3rd ed., p. 303, s. 254. See for meaning of the term "law of a country," Intro., pp. 5-7, *ante*, and also chap. i., p. 75, *ante*. *Bremer v. Freeman*, 1857, 10 Moore P. C. 306; *Collier v. Rivas*, 1841, 2 Curt. 855; *Hamilton v. Dallas*, 1875, 1 Ch. D. 257.

ever, to retain a domicile in England. He occasionally exercises political rights there, and always describes England in formal documents as his domicile. He has not fulfilled the legal requirements of French law already referred to. *D* is domiciled in France.¹

This principle must, of course, be restrained to the legal requirements of *foreign* law.² If an English statute required that a person should, in order to be domiciled in a country, perform certain legal conditions, such as depositing a declaration with an official of his intention to become domiciled therein, the rule laid down by the statute would, like any other part of English law, be applied by our Courts.³

Change of Domicil.

RULE 8.⁴

- (1) The domicile of origin is retained until a domicile of choice is in fact acquired.
- (2) A domicile of choice is retained until it is abandoned, whereupon either
 - (i) a new domicile of choice is acquired ; or
 - (ii) the domicile of origin is resumed.

Comment and Illustrations.

An independent person⁵ retains a domicile in a country where he has once acquired it until he has (in the strict sense of the term abandonment) abandoned⁶ that country by giving up, not only his residence there but also his intention to reside there, or, to use untechnical language, until he has left the country for good. But, though a domicile is never changed without actual abandonment of an existing domicile, the legal effect of a man's having left a country where he is domiciled for good differs according as the domicile is a domicile of origin or a domicile of choice.

(1) *Domicil of origin.* — *How changed.* — “Every man's domicile of origin must be presumed to continue, until he has acquired

¹ *Hamilton v. Dallas*, 1875, 1 Ch. D. 257.

² See, however, as to the possible effect of the Indian Succession Act, 1865, on a person's domicile, the Scotch case, *Wauchope v. Wauchope*, 23 June, 1877, 4 Rettie, 945.

³ See as to the Domicile Act, 1861, p. 97, *ante*.

⁴ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441 ; *Bell v. Kennedy*, 1868, L. R. 1 Sc. App. 307.

⁵ For meaning of term “independent person,” see p. 69, *ante*.

⁶ See p. 83, *ante*.

“another sole domicile by actual residence, with the intention of abandoning his domicile of origin. This change must be *animo et facto*, and the burden of proof unquestionably lies on the party who asserts that change.”¹ “It is a clear principle of law, that the domicile of origin continues until another domicile is acquired, *i. e.*, till the person whose domicile is in question has made a new home for himself in lieu of the home of his birth.”²

The meaning of these expressions is that a domicile of origin cannot be simply abandoned. If *D* is in possession of an English domicile of origin, he may indeed in fact abandon England as his home without in reality settling elsewhere, but, in the eye of the law, he cannot give up or get rid of his domicile of origin until he has in fact changed it for another by settling in another country. Though in reality homeless, he will, until he settles elsewhere, be considered to have his legal home or domicile in England.

D, the descendant of a Scotch family, had a domicile of origin in Jamaica. In 1837, after he came of age, he sold his estates in Jamaica and left the island, to use his own expression, for good. He then went to Scotland, and was resident there during 1838, but without making up his mind whether to settle in Scotland or not. The question came before the Courts whether on the 28th September, 1838, *D* was or was not domiciled in Scotland. The Court of Session held that he had then acquired a Scotch domicile. But the House of Lords, reversing the decision of the Court of Session, held that *D* still remained domiciled in Jamaica.

Their decision was based on the ground that though *D* was on the 28th September, 1838, resident in Scotland, he had not at that moment any fixed or settled purpose to make Scotland his future home; that, in short, he was resident in Scotland, but without the *animus manendi*, and therefore had not acquired a Scotch domicile, but still retained his domicile of origin, *i. e.*, was domiciled in Jamaica.³

(2) *Domicil of choice.* — *How changed.* — A domicile of choice or a home is retained⁴ until both residence (*factum*) and intention to reside (*animus*) are in fact given up, but when once both of these conditions have ceased to exist, it is abandoned as well in law as in fact.

Of the principle that a domicile of choice is retained until actual abandonment, the following case affords a good illustration :

¹ *Aikman v. Aikman*, 1861, 3 Macq. 854, 877, per Lord Wensleydale.

² *Ibid.*, p. 863, per Lord Cranworth.

³ *Bell v. Kennedy*, 1868, L. R. 1 Sc. App. 307; see especially, judgment of Lord Westbury, pp. 320, 321, 322.

⁴ See pp. 85, 86, *ante*.

D, a widow, whose domicile of origin was English, acquired by marriage a domicile in France. After her husband's death she determined to return to England as her home. She went on board an English steamer at Calais, but was seized with illness, *and before the vessel left the harbour*, re-landed in France, where after some months (though wishing to return to England) she died, having been unable on account of ill health to leave France. *D* retained her French domicile. "I cannot think," it was laid down, "that there was a sufficient act of abandonment, so long as the deceased remained within the territory of France, her acquired domicile."¹

The case is an extreme one, but was clearly well decided; it exactly illustrates the principle that a domicile of choice is retained until actual residence in a country is brought to an end. So, again, *D*, an Englishman, who had acquired a domicile of choice in Germany, returned for a time to England, but retained the intention to reside permanently in Germany. He did not lose his German domicile.² This case illustrates the principle that a domicile once acquired is retained until the intention to reside is brought to an end. To use, in short, technical language, the domicile of choice is retained, either *facto* or *animo*.³

The principle, on the other hand, that actual abandonment of such a domicile puts an end to its existence, not only in fact, but in law, has been judicially stated in the following terms:

"It seems reasonable to say, that if the choice of a new abode and actual settlement there constitute a change of the original domicile, then the exact converse of such a procedure, viz., the intention to abandon the new domicile, and an actual abandonment of it, ought to be equally effective to destroy the new domicile. That which may be acquired may surely be abandoned."⁴

(i) *Acquisition of new domicile of choice.* — The abandonment

¹ *In Goods of Raffeneil*, 1863, 32 L. J. P. & M. 203, 204, per Sir C. Cresswell.

² *Re Steer*, 1858, 28 L. J. Ex. 22; 3 H. & N. 594.

³ But it is not sufficient for the abandonment of a domicile of choice that a man should be simply dissatisfied with it and intend to leave it. "If a man loses his domicile of choice, then, without anything more, his domicile of origin revives; but in my opinion, in order to lose the domicile of choice once acquired, it is not only necessary that a man should be dissatisfied with his domicile of choice, and form an intention to leave it, but he must have left it, with the intention of leaving it permanently. Unless he has done that, unless he has left it both *animo et facto*, the domicile of choice remains." *In re Marretti*, 1887, 36 Ch. D. (C. A.) 400, 407, judgment of Cotton, L. J.

⁴ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 450, per Hatherley, C.

of one domicile of choice may, as a matter of fact, coincide with the acquisition of another.¹ *D*, for example, whose domicile of origin is English, has acquired a domicile of choice in France. He goes to Germany, intending to reside there for a short time, and, therefore, on arriving in Germany, still retains his French domicile of choice. But after residing in Germany for some time, he makes up his mind to reside there permanently; at that moment, both his French domicile of choice is abandoned, and a German domicile of choice is acquired.

So far there is no difference between a domicile of origin and a domicile of choice; either may be abandoned simultaneously with the actual acquisition of another domicile.

(ii) *Resumption of domicile of origin*. — A person in possession of a domicile of choice may abandon it, and at the same moment, in actual fact, resume his domicile of origin. This case presents no peculiarity, and is, in its essential features, exactly like the case already considered, of *D*'s in fact abandoning one domicile of choice simultaneously with the acquisition of another.

But another state of circumstances is possible. A person may, as a matter of fact, abandon a home or domicile of choice in one country without in fact acquiring a home in another.²

D, for example, whose domicile of origin is English, has an acquired home or domicile of choice in France. He leaves France for good, without any intention of returning to England, or of settling in any country whatever. He is in fact homeless. As, however, no one can in the eye of the law be without a domicile,³ it is a matter of logical necessity that, in order to give *D* a domicile, one of two fictions should be adopted.

It might, in the first place, be held, that in the case of an acquired, as of an original domicile, any existing domicile was retained until another was actually acquired; or, to take *D*'s particular case, that *D* retained his French domicile, until he in fact settled in some other country. This view, however, which was at one time adopted by our Courts, is now rejected.⁴

It might, in the second place, be held that on the simple abandonment of a domicile of choice, the domicile of origin is by a rule of law at once resumed or re-acquired, and this is the view now adopted by English tribunals.

D, for example, when he leaves France for good, without any

¹ See p. 85, *ante*.

² See pp. 84, 86, 87, *ante*.

³ See Rule 2, p. 94, *ante*.

⁴ See *Munroe v. Douglas*, 1820, 5 Madd. 379.

intention of settling elsewhere, immediately re-acquires his English domicile. For the true doctrine is, that the domicile of origin reverts from the moment that the domicile of choice is given up. "This is a necessary conclusion, if it be true that an acquired domicile ceases entirely whenever it is intentionally abandoned, and that a man can never be without a domicile. The domicile of origin always remains, as it were, in reserve, to be resorted to in case no other domicile is found to exist."¹

Hence, whenever a person in fact abandons a domicile of choice, without actually acquiring a new domicile of choice, his domicile of origin is always resumed; for either he resumes it in fact, or if he does not do so in fact, he is assumed by a rule of law to resume or re-acquire it.

The precise difference in this matter between a domicile of origin and a domicile of choice may be seen from the following illustration:

An Englishman whose domicile of origin is English, and a Scotchman whose domicile of origin is Scotch, are both domiciled in England, where the Scotchman has acquired a domicile of choice. They leave England together, with a view to settling in America, and with the clearest intention of never returning to England. At the moment they set sail their position is in matter of fact exactly the same; they are both persons who have left their English home, without acquiring another. In matter, however, of law their position is different; the domicile of the Englishman remains English, the domicile of the Scotchman becomes Scotch. The Englishman retains his domicile of origin, the Scotchman abandons his domicile of choice, and re-acquires his domicile of origin. If they perish intestate on the voyage, the succession² to the movables of the Englishman will be determined by English law, the succession to the movables of the Scotchman will be determined by Scotch law. The Englishman will be considered to have his legal home in England, whilst the Scotchman will be considered to have his legal home in Scotland.³

The distinction pointed out in Rule 8 between a domicile of origin and a domicile of choice is borne out by the decision of the House of Lords in *Udny v. Udny*. D's domicile of origin was Scotch. He settled in England, and acquired there a domicile of choice; he then abandoned England as his home, and went to

¹ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 454, per Lord Chelmsford.

² See Rule 180, *post*.

³ But see as to Westlake's dissent, p. 112, note 3, *ante*.

reside at Boulogne, without, however, intending to settle or becoming domiciled in France. It was held that under these circumstances *D* resumed his Scotch domicile of origin at the moment when he left England.¹

Rule 8 applies only to the domicile of independent persons. An infant, for example, may lose his domicile of origin without, in fact, acquiring a home or domicile of choice in any country.

Thus *D* is the infant son of *M*, whose domicile of origin is English. At *D*'s birth, *M* is domiciled in France. *D*'s domicile of origin is therefore French.² *M* leaves France for good, taking *D* with him, and intending to settle in America. During the voyage across the Atlantic, *M*'s domicile,³ and therefore *D*'s,⁴ is English; but *D* has never resided in England, and is, in fact, homeless. *D* therefore has changed his domicile of origin without the acquisition of a home in any country.

It is easy to work out a similar result in the case of a wife.

Domicil of Dependent Persons (Minors and Married Women).

RULE 9.⁵—The domicile of every dependent person⁶ is the same as, and changes (if at all) with, the domicile of the person on whom he is, as regards his domicile, legally dependent.

Comment.

The general principle here stated is, that a person not *sui juris*, such as a minor or a wife, has the domicile of the person on whom he or she is considered by law to be dependent.

The words "if at all" should be noticed. They are intended to meet the position of a dependent person whose domicile cannot, at the moment, be changed at all. Such is the position of a minor without parents or guardians. He cannot change his

¹ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441. This is the leading case on the change of domicile, and taken together with *Bell v. Kennedy*, L. R. 1 Sc. App. 307, contains nearly the whole of the law on the subject. The judgment of Lord Westbury, pp. 458, 459, should be particularly studied.

² See Rule 6, p. 101, *ante*.

³ See pp. 117, 118, *ante*.

⁴ See Rule 9, and Sub-Rule 1, *post*.

⁵ See especially, *Westlake*, 3rd ed., pp. 300–302; *Savigny*, s. 353, *Guthrie's transl.*, 2nd ed., pp. 97–106. For further authorities, see notes to Sub-Rule 1, p. 120, *post*, and Sub-Rule 2, p. 127, *post*.

⁶ For meaning of "dependent person," see p. 69, *ante*.

domicil himself, for he is not independent. It cannot at the moment be changed for him, because there is no person in existence on whom he is legally dependent.

The operation of the Rule is seen from the resulting Sub-Rules.

SUB-RULE 1. — Subject to the exceptions hereinafter mentioned, the domicil of a minor is during minority determined as follows : —

- (1) The domicil of a legitimate or legitimated minor is, during the lifetime of his father, the same as, and changes with, the domicil of his father.¹
- (2) The domicil of an illegitimate minor, or of a minor whose father is dead, is, whilst the minor lives with his mother, the same as, and changes with, the domicil of the mother (?).²
- (3) The domicil of a minor without living parents, or of an illegitimate minor without a living mother, possibly is the same as, and changes with, the domicil of his guardian, or may be changed by his guardian (?).³

Comment and Illustrations.

(1) *Case of legitimate minor.* — A child's domicil during minority changes, while the father is alive, with the domicil of the father.

¹ *Somerville v. Somerville*, 1801, 5 Ves. 749 a ; 5 R. R. 155 ; *Sharpe v. Crispin*, 1869, L. R. 1 P. & D. 611 ; *Forbes v. Forbes*, 1854, Kay, 341 ; 23 L. J. (Ch.) 724, 726, 727 ; *In re Macreight*, 1885, 30 Ch. D. 165 ; *In re Beaumont*, [1893] 3 Ch. 490.

² *Pottinger v. Wightman*, 1817, 3 Mer. 67 ; 17 R. R. 20 ; *In re Beaumont*, [1893] 3 Ch. 490. See also the American cases, *Holyoke v. Hoskins*, 5 Pick. 20 ; *School Directors v. James*, 2 Watts & Serg. 567 ; *Ryall v. Kennedy*, 40 N. Y. (S. C.) 347, 361 ; and the Scotch case, *Arnott v. Groom*, 1846, 9 D. 142. See *Wharton*, ss. 41, 42.

³ *Pottinger v. Wightman*, 1817, 3 Mer. 67 ; 17 R. R. 20 ; *Johnstone v. Beattie*, 1843, 10 Cl. & F. 42, 66, language of *Lyndhurst*, Ch. ; 138-140, judgment of Lord Campbell ; *Sharpe v. Crispin*, 1869, L. R. 1 P. & D. 611, 617 ; *In re Beaumont*, [1893] 3 Ch. 490. But these authorities refer almost wholly to the authority of a mother to change the domicil of a child whose father is dead, and hardly determine what is the authority in that respect of a guardian. Compare especially, *Westlake*, 3rd ed., pp. 300, 301, and see pp. 123, 124, *post*.

D is the legitimate son of a domiciled Englishman,¹ and is himself born in England. When *D* is ten years old, his father emigrates to America and settles there. *D* is left at school in England.² *D* thereupon acquires an American domicile.

D is the infant son of Scotch parents, domiciled in Scotland, who marry after *D*'s birth. *D* is thereby legitimated. His father then, while *D* is still a minor, acquires an English domicile. *D*'s domicile thereupon becomes English.³

(2) *Case of minor who is illegitimate, or whose father is dead.* — The domicile of an illegitimate child, or of a child whose father is dead, is, during his minority, if he lives with his mother,⁴ probably the same as, and (subject to the possible effect of Exception 1)⁵ changes with, the domicile of his mother.

D is the illegitimate son of a domiciled Englishman and a Frenchwoman, domiciled at the time of *D*'s birth in England.⁶ The mother, when *D* is five years old, goes with him to France, and resumes her original French domicile. *D* acquires a French domicile.⁷

There was at one time a doubt whether, after the death of the father, the children, remaining under the care of the mother, followed her domicile, or, until the end of their minority, retained that which their father had at the time of his death. The case, however, of *Pottinger v. Wightman*⁸ must now be taken conclusively to have settled the general doctrine, that (subject at any rate to the exceptions hereinafter mentioned) if, after the death of the father, an unmarried infant lives with his mother, and the mother acquires a new domicile, it is communicated to the infant.⁹

¹ The expression domiciled Englishman or Englishwoman, domiciled Frenchman or Frenchwoman, etc., means a man or woman domiciled in England, or a man or woman domiciled in France, etc.

² See especially, *Urquhart v. Butterfield*, 1887, 37 Ch. D. (C. A.) 337, 381, judgment of Cotton, L. J.; *Ryall v. Kennedy*, 40 N. Y. (S. C.) 347, 360.

³ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441. On this point there is no doubt. The domicile of a legitimated minor is during his minority clearly that of his father. The only doubt is how far legitimation affects the domicile of origin of the legitimated person. See pp. 101, 104, *ante*.

⁴ If he does not live with his mother, his domicile need not change together with hers. *In re Beaumont*, [1893] 3 Ch. 490; *Westlake*, 3rd ed., p. 300.

⁵ See p. 125, *post*.

⁶ See as to England being *D*'s domicile of origin, Rule 6, p. 101, *ante*.

⁷ Compare *Westlake*, p. 300.

⁸ 3 Mer. 67.

⁹ *Johnstone v. Beattie*, 1843, 10 Cl. & F. 42, 138, judgment of Lord Campbell. See *In re Beaumont*, [1893] 3 Ch. 490; *Phillimore*, ss. 115–119.

The principle on which the domicile of a minor may be changed through the acquisition of a new domicile by his mother, when a widow, appears to be this: The domicile of the minor does not in strictness follow, as a matter of law, the domicile of his mother, but may be changed by her, for "the change in the domicile of an "infant which, as is shown by the decision in *Pottinger v. Wightman*,¹ may follow from a change of domicile on the part of the "mother, is not to be regarded as the necessary consequence of a "change of the mother's domicile, but as the result of the exercise "by her of a power vested in her for the welfare of the infants, "which, in their interest, she may abstain from exercising, even "when she changes her own domicile."²

The position of a widow, then, with regard to her child, who is a minor, may be thus described: She may change her own domicile and settle with him in another country. She in this case, in fact, changes the minor's domicile, but she does not, as a matter of law, change his domicile simply by changing her own. Thus, a widow is left, on the death of her husband, with three children, who are minors. She and they are domiciled in Scotland. She afterwards settles in England with her two eldest children and acquires an English domicile. The two eldest children, thereupon, become domiciled in England. The youngest child, *D* (though occasionally visiting his mother), remains and resides permanently in Scotland until he attains his majority. *D* retains his Scotch domicile.³

Questions as to effect of widow's change of domicile. — Difficult questions may, however, be raised as to the effect of a widow's change of domicile on that of her children, when she is not their guardian. Such questions may refer to the two different cases of minors who reside and of minors who do not reside with their mother.

First question. — Suppose that a minor resides with his mother, who is not his guardian. The question may be raised whether the domicile of the minor is determined by that of the mother, or by that of the guardian. No English case absolutely decides the precise point, but it may be laid down with some confidence that even if a guardian can in any case change the domicile of his ward, yet the domicile of a child living with his mother, whilst still a widow, will be that of the mother and not of the guardian.⁴

¹ 3 Mer. 67.

² *In re Beaumont*, [1893] 3 Ch. 490, 496, 497, judgment of *Stirling, J.*

³ See *In re Beaumont*, [1893] 3 Ch. 490. This case is not quite decisive, as the widow changed her domicile in consequence of re-marriage.

⁴ See American cases, *Ryall v. Kennedy*, 40 N. Y. (S. C.) 347; *Holyoke v. Hoskins*, 5 Pick. 20; *School Directors v. James*, 2 Watts & Serg. 568.

Second question. — Suppose that a minor resides away from his mother, who is not his guardian. The question whether it is on his mother or his guardian that the change of the child's domicile depends presents some difficulty. In the absence of decisions on the subject, it is impossible to give any certain answer to the inquiry suggested. It is quite possible that, whenever the point calls for decision, the Courts may hold that there are circumstances under which a minor's domicile must be taken, even in the lifetime of the mother, to be changed by the guardian.

These questions, and others of a similar character, really raise the general inquiry whether, as a matter of law, a minor's domicile is identified with that of his widowed mother, to the same extent to which it is identified with that of his father during the father's lifetime?

To this general inquiry a negative answer must, as already pointed out,¹ be given. There are various circumstances under which the Courts will hold that a minor, in spite of a change of domicile on the part of his mother, retains the domicile of his deceased father. Still, in general, the rule appears to hold good that the domicile of a minor, whose father is dead, usually in fact changes with the domicile of the child's mother.²

D is the son of a person domiciled in Jersey. When *D* is ten years old his father dies. *D*'s mother leaves Jersey, taking *D* with her, and settles and acquires a domicile in England. *D* thereupon acquires an English domicile.³

(3) *Case of minor without living parents.* — It is possible that the domicile of an orphan follows that of his guardian, but whether this be so or not is an open question.⁴

In the first place, it may be doubted⁵ whether the rule is not rather that a ward's domicile can be changed, in some cases, by his guardian, than that it follows the domicile of his guardian. It is difficult to believe that the mere fact of *D*'s guardian acquiring for himself a domicile in France can deprive *D*, the son of a domiciled Englishman, of his English domicile.

In the second place, the power of a guardian to change at all the domicile of his ward is doubtful. In the leading English case

¹ See p. 122, *ante*.

² *In re Beaumont*, [1893] 3 Ch. 490.

³ See *Pottinger v. Wightman*, 1817, 3 Mer. 67; compare *In re Beaumont*, [1893] 3 Ch. 490.

⁴ See, however, *Westlake*, 3rd ed., pp. 300, 301, s. 250.

⁵ This doubt is strengthened by *In re Beaumont*, [1893] 3 Ch. 490.

on the subject,¹ the guardian was also the mother of the children. As a matter of common sense, it can hardly be maintained that the home of a ward is, in fact, or ought to be, as a matter of convenience, identified with the home of his guardian, in the same way in which the home of a child is naturally identified with that of his father. Should the question ever arise, it will possibly be held that a guardian cannot² change the domicile of his ward, and almost certainly that he cannot do this, unless the ward's residence is, as a matter of fact, that of the guardian.³

D is the orphan son of a domiciled Englishman. *M* is *D*'s guardian. *M* takes *D* to reside in Scotland, where *M* himself settles and acquires a domicile. *D* possibly acquires a Scotch domicile.

Sub-Rule 1 may, perhaps, be extended to the domicile of an adult, who, though he has attained his majority, has never attained sufficient intellectual capacity to choose a home for himself. From the language used by the Court in one case, it would appear that such a person may be considered to occupy a condition of permanent minority.

D, in the case referred to, was the son of an Englishman domiciled in Portugal. There never was a period when *D*, though he attained his majority, could think and act for himself in the matter of domicile otherwise than as a minor could. After *D* became of age, his father acquired an English domicile. Under these circumstances, the effect of the father's change of domicile had to be considered, and the law on the subject was thus laid down:—

“I am assuming that [*D*] was of unsound mind throughout his “majority,—in other words, that there never was a period dur-

¹ *Pottinger v. Wightman*, 1817, 3 Mer. 67.

² “It seems doubtful whether a guardian can change an infant's domicile. The difficulty is that a person may be guardian in one place and not in “another.” *Douglas v. Douglas*, 1871, L. R. 12 Eq. 617, 625, per *Wickens*, V. C. See as to the position of a guardian, Rules 130–132, *post*.

³ On the continent it is generally held that the minor's domicile is fixed by the father's death, and cannot be changed during minority by the mother or guardian, except by act of law. The preponderating opinion in England and America is, that such a change by a surviving parent will be sustained by the Courts, when it is made reasonably and in good faith. *Wharton*, s. 41; and see American cases, *School Directors v. James*, 2 Watts & Serg. 568; *Holyoke v. Hoskins*, 5 Pick. 20; *White v. Howard*, 52 Barb. 294. The leading English case is *Pottinger v. Wightman*, 1817, 3 Mer. 67. It does not appear to be approved by *Story*, s. 506, note 1, and on the whole I have considerable doubt whether the continental rule will not be ultimately maintained by our Courts. For discussion of whole question, see *Jacobs, Law of Domicil*, ss. 249–256.

"ing which he could think and act for himself in the matter of
 "domicil otherwise than as a minor could. And if this be so, it
 "would seem to me that the same reasoning which attaches the
 "domicil of the son to that of his father while a minor would con-
 "tinue to bring about the same result, after the son had attained
 "his majority, if he was continuously of unsound mind. The son
 "in this case continued under the control of his father, was pre-
 "sumably supported by him, and, if he had not already been in
 "England when his father returned hither in 1843, would, it may
 "reasonably be presumed, have been brought with him. At no
 "period could he, according to the hypothesis [that he was con-
 "tinuously of unsound mind] have acted for himself in choosing
 "a domicil, and if his next of kin and those who had the control
 "of his movements and life were not capable of changing his
 "domicil, that domicil would, from the moment of his majority,
 "have become indelible. The better opinion, in my judgment, is,
 "that the incapacity of minority never having in this case been
 "followed by adult capacity, continued to confer upon the father
 "the right of choice in the matter of domicil for his son, and that
 "in 1843, . . . that right was exercised by the adoption of an
 "English domicil for himself which drew with it a similar domicil
 "for his son."¹

The extension of the general rule applies only to persons of continuously unsound mind. If a son on attaining his majority enjoys a period of mental capacity, he can acquire a domicil for himself. Whether, if he became incapable, his acquired domicil could be changed, is a matter of doubt. The question in his case is the same as the inquiry which is hereinafter considered,² how far the domicil of a lunatic can be changed during lunacy.

Exception 1 to Sub-Rule. — The domicil of a minor is not changed by the mere re-marriage of his mother.³

Comment.

If an infant's father dies, the infant's domicil "follows, in the
 "absence of fraud, that of its mother, until such time as the
 "mother re-marries, when, by reason of her own domicil being

¹ *Sharpe v. Crispin*, 1869, L. R. 1 P. & D. 611, 618, judgment of Sir J. P. Wilde. The case is not decisive, as the Court held that if the son was capable of choosing a domicil, he had, as a matter of fact, chosen that of his father.

² See comment on Rule 18, *post*.

³ See Amer. cases, *Ryall v. Kennedy*, 40 N. Y. (Superior Court) 347; *Brown v. Lynch*, 2 Bradf. Surrogate Rep. (N. Y.) 214. Compare as to American views, *Jacobs, Law of Domicil*, s. 244. But contrast *In re Beaumont*, [1893] 3 Ch. 490.

"subordinate to that of her husband, that of the infant ceases to follow any further change by the mother, or, in other words, "does not follow that of its stepfather."¹ This doctrine laid down in an American case is to a certain extent followed by our Courts, with the result that an infant domiciled in England at the time of his mother's re-marriage as a general rule retains the domicile which he had immediately before the mother's re-marriage.²

But the American doctrine is not to be followed to its full extent. It is reasonable to hold that the fiction which assigns to a woman on marriage the domicile of her husband should not be extended so as necessarily to give to stepchildren the domicile of their stepfather; but it is less easy to see why it should be held that a widow, on re-marriage, loses all control over the domicile of her infant children, born during her first marriage.³

Our Courts, therefore, hold⁴ that while the re-marriage of a widow, whereby she acquires a new domicile, does not of itself affect the domicile of her infant children, yet if a woman after her second marriage in fact changes her domicile, *e. g.*, from England to Germany, and takes the infant children of her first husband with her, they, too, acquire a German domicile.⁵

The father and mother of a minor are, at the death of the father, domiciled in England. The widow retains her English domicile until her marriage in England with a Frenchman resident in England, but domiciled in France. She thereby acquires a French domicile. The minor retains his English domicile.

The father and mother of *D*, a minor, are at his birth domiciled in England. The father dies, and the mother thereupon, when *D* is two years old, goes with him to Germany, marries a German, and acquires a German home and domicile. *D* resides with his mother. *D*, perhaps, acquires a German domicile.

Exception 2 to Sub-Rule. — The change of a minor's home by a mother or a guardian does not, if made with a fraudulent purpose, change the minor's domicile.

Comment.

A mother or guardian cannot, perhaps, change the domicile of a minor when the change of home is made for a fraudulent purpose,

¹ *Ryall v. Kennedy*, 40 N. Y. (Superior Court) 347, 360, *per Curiam*.

² The same principle applies to the marriage of the mother of an illegitimate infant.

³ *In re Beaumont*, [1893] 3 Ch. 490. See judgment of *Stirling, J.*, p. 497, where this remark is approved.

⁴ *Ibid.*

⁵ *Ibid.*

e. g., to affect the distribution of a minor's estate, in case of his death.¹ The existence, however, of this exception is open to doubt.

D, a minor, whose father is dead, is domiciled in England. *M*, the minor's mother, expecting him to die, takes him to Jersey, and acquires a domicile there, in order that the succession to *D*'s property may be according to the law of Jersey, and not according to that of England.

It is doubtful whether *D*'s domicile does not remain English.

SUB-RULE 2. — The domicile of a married woman is during coverture the same as, and changes with, the domicile of her husband.²

Comment.

A woman, of whatever age, acquires at marriage the domicile of her husband, and her domicile continues to be the same as his, and changes with his, throughout their married life.

The fact that a wife actually lives apart from her husband,³ that they have separated by agreement,⁴ that the husband has been guilty of misconduct, such as would furnish defence to a suit by him for restitution of conjugal rights,⁵ does not enable the wife to acquire a separate domicile. It is an open question whether even a judicial separation (not amounting to a divorce) would give a wife the power to acquire a domicile for herself.⁶ "If," says Lord Kingsdown, "any expressions of my noble and learned 'friend' have been supposed to lead to the conclusion, that his 'impression was in favour of the power of the wife to acquire 'a foreign domicile [not her husband's], after a judicial separation, 'it is an intimation of opinion in which at present I do not 'concur. I consider it to be a matter, whenever it shall arise, 'entirely open for the future determination of the House.'" ⁷

¹ See *Pottinger v. Wightman*, 1817, 3 Mer. 67.

² *Warrender v. Warrender*, 1835, 2 Cl. & F. 488; *Dolphin v. Robins*, 1859, 7 H. L. C. 390; 29 L. J. (P. & M.) 11; *Re Daly's Settlement*, 1858, 25 Beav. 456; 27 L. J. (Ch.) 751. Compare *Westlake*, 3rd ed., p. 302, s. 253; *Story*, s. 46; *Phillimore*, ss. 73-78; *Wharton*, s. 43; *Savigny*, s. 357.

³ *Warrender v. Warrender*, 1835, 2 Cl. & F. 488.

⁴ *Dolphin v. Robins*, 1859, 7 H. L. C. 390.

⁵ *Yelverton v. Yelverton*, 1859, 1 Sw. & Tr. 574; *Dolphin v. Robins*, 1859, 7 H. L. C. 390; 29 L. J. (P. & M.) 11.

⁶ *Dolphin v. Robins*, 7 H. L. C. 390, 420; *Le Sueur v. Le Sueur*, 1877, 1 P. D. 139; 2 P. D. 79.

⁷ Lord Cranworth.

⁸ 7 H. L. C. 420, judgment of Lord Kingsdown.

D, an Englishwoman, married *M*, a domiciled Englishman. After some years they agreed to live separate, and ultimately obtained a divorce, which, however, was not valid, from the Scotch Courts. *D*, after the supposed divorce, resided in France, and during *M*'s lifetime married *N*, a domiciled Frenchman. *M*, her English husband, remained domiciled in England till *D*'s death in France. *D*, at her death, was domiciled in England and not in France.¹

RULE 10. — A domicile cannot be acquired by a dependent person through his own act.²

Comment and Illustration.

A person who is not *sui juris* may, as a matter of fact, acquire an independent home. Thus *D*, an infant of eighteen, emigrates to Australia, buys a farm, and settles there. He in fact makes a home for himself in Australia. So, again, if *D*, a married woman, has entirely ceased to live with her husband (who resides in England), and goes and settles in Germany, with the intention of passing the rest of her life there, it is clear that she has in fact acquired an independent German home. What the rule in effect lays down is that there is a distinct difference, in the point under consideration, between a home and a domicile, and that though an infant or a wife may sometimes in fact, as in the cases supposed, acquire a home, neither of them can acquire an independent domicile.

(1) *Minor*. — It is certain that, as a general rule, no one can, during his minority acquire a domicile for himself.³

It has, however, been suggested⁴ that a man, though a minor,

¹ *Dolphin v. Robins*, 1859, 29 L. J. (P. & M.) 11 ; 7 H. L. C. 390.

² *Somerville v. Somerville*, 1801, 5 Ves. 749 a, 787, judgment of Arden, M. R. The case of a female infant who changes her domicile on marriage, as where an Englishwoman of eighteen marries a domiciled Frenchman, may perhaps be held to afford a verbal exception to this Rule. This is not a real exception. The change is not affected by the infant's act, but by a consequence attached by law to the status arising from her act.

³ *Somerville v. Somerville*, 1801, 5 Ves. 749 a, 787, judgment of Arden, M. R. Conf. *Urquhart v. Butterfield*, 1887, 37 Ch. D. (C. A.) 346, 383, 384, judgment of Lindley, L. J., pp. 384, 385, judgment of Lopes, L. J. ; *Jacobs, Law of Domicil*, s. 229.

⁴ See *Savigny, Guthrie's transl.*, 2nd ed., s. 353, p. 100, and compare *Westlake*, 1st ed., s. 37, with *Westlake*, 3rd ed., p. 300, s. 249. See, also, *Stephens v. McFarland*, 1845, 8 Ir. Rep. 444.

may possibly acquire a domicile for himself by marriage, or by setting up an independent household. The reason for this suggested exception to the general rule is that a married minor must be treated as *sui juris* in respect of domicile, since on his marriage he actually founds an establishment separate from the parental home. This reason must, if valid, extend to all cases in which a minor in fact acquires an independent domicile, and it is not satisfactory. It involves some confusion between domicile and residence,¹ and derives no support from the view taken by English law as to an infant's liability on his contracts, which is in no way affected by his marriage. The reasoning, therefore, by which the suggested exception is supported may be held unsound, and the existence of the exception itself be deemed open to the gravest doubt.

(2) *Married Woman*. — Though a wife may acquire a home for herself, she can under no circumstances have any other domicile or legal home than that of her husband.²

SUB-RULE. — Where there is no person capable of changing a minor's domicile, he retains, until the termination of his minority, the last domicile which he has received.³

Illustration.

D is a minor, who at the death of his father has an English domicile. His mother is dead, and he has no guardian. *D* cannot change his own domicile, there is no person capable of changing it. *D* therefore retains his English domicile.

RULE 11. — The last domicile which a person receives whilst he is a dependent person continues, on his becoming an independent person, unchanged until it is changed by his own act.

Comment.

This is an obvious result of Rule 4.⁴ It applies to the case,

¹ See p. 80, *ante*.

² *Warrender v. Warrender*, 1835, 2 Cl. & F. 488, *Dolphin v. Robins*, 1859, 7 H. L. C. 390; 29 L. J. (P. & M.) 11; *Yelverton v. Yelverton*, 1859, 1 Sw. & Tr. 574; 29 L. J. (P. & M.) 34.

³ See Rules 4–10, pp. 98–123, *ante*.

⁴ See p. 98, *ante*.

first, of a person who attains his majority, and secondly, of a wife whose coverture is determined either by death or by divorce.

SUB-RULE 1.—A person on attaining his majority retains the last domicile which he had during his minority until he changes it.¹

Illustration.

D is the son of *M*, a domiciled Englishman. While *D* is a minor, *M* emigrates to America. *D* thereupon acquires an American domicile. When *D* attains his majority, *M* is still domiciled in America. *D* retains his American domicile until by his own act he either resumes his English domicile, or acquires a new, *e. g.*, a French domicile.

SUB-RULE 2.—A widow retains her late husband's last domicile until she changes it.²

Illustrations.

1. *D*, a woman whose domicile of origin is English is married to a German domiciled in Prussia. Her husband dies. *D* continues living in Prussia. *D* retains her Prussian domicile.

2. *D*, after the death of her German husband, leaves Prussia to travel, without any intention of returning to Prussia. *D* resumes her English domicile of origin.

3. *D*, after the death of her German husband, settles in France with the intention of residing there permanently. *D* acquires a French domicile.

4. *D*, after the death of her German husband, marries at Berlin an American domiciled at New York. *D* acquires a domicile at New York.

SUB-RULE 3.—A divorced woman retains the domicile which she had immediately before, or at the moment of divorce, until she changes it.

¹ A possible question may be raised as to domicile of an infant widow. Probably it remains that of her husband, and cannot be changed (except in consequence of re-marriage) till she comes of age.

² See *Story*, s. 46, citing *Dig. Lib.* 50, tit. 1, l. 38, s. 3; *Gout v. Zimmermann*, 1847, 5 Notes of Cases, 440, 455; *Jacobs, Law of Domicil*, s. 222.

Comment.

The position of a divorced woman is for the present purpose the same as that of a widow.

III. ASCERTAINMENT OF DOMICIL.¹*Domicil—How Ascertained.*

RULE 12.—The domicil of a person can always be ascertained by means of either

- (1) a legal presumption ; or
- (2) the known facts of the case.

Comment.

Even on the assumption that every one has at all times a domicil, there may often (if the thing be considered without reference to rules of law) be a difficulty in determining where a given person, *D*, had his home or domicil at a particular moment. The difficulty may arise from ignorance of the events of *D*'s life, or from the circumstance that the facts which are known to us leave it an open question whether *D* was at a given moment (say at the date of his death) domiciled in England or in Scotland. Under such circumstances, an inquirer who had no other object than the investigation of truth, and who was neither aided nor trammelled by legal rules, would, if he tried to ascertain where *D* was domiciled at the date of his death, be forced to acquiesce in the merely negative conclusion that *D*'s domicil at that date could not be ascertained. To this negative result the Courts, from obvious motives of convenience, refuse to come,² and will always, however slight or inconclusive in itself may be the character of the evidence placed before them, determine in what country *D* was at a given moment domiciled.

This result is obtained partly by the use of certain legal presumptions,³ partly, where the claims of each of two places to be *D*'s domicil are on the known facts of the case all but equally

¹ The *criteria* or proofs of domicil are most fully investigated, *Phillimore*, ss. 211–351.

² Contrast this with the absence of any legal presumption as to the moment at which a death takes place. *In re Phené's Trusts*, 1870, L. R. 5 Ch. 139 ; *In re Walker*, 1871, L. R. 7 Ch. 120 ; *Mason v. Mason*, 1 Mer. 308.

³ See Rules 13, 14, pp. 132, 133, *post*.

balanced, by allowing the very slightest circumstance¹ to turn the scale decisively in favour of the one rather than of the other.² Hence (though the fact is not always realised by writers on domicile) the process by which a person's domicile is determined by the Courts has a somewhat artificial character.

Legal Presumptions.

RULE 13.—A person's presence in a country is presumptive evidence of domicile.

Comment.

"A person's being in a place is *primâ facie* evidence of his "being domiciled there, and it lies on those who say otherwise "to rebut this presumption."³ "The actual place where [a man] "is, is *primâ facie* to a great many given purposes, his domicile."⁴ Hence the importance often attached in questions of domicile to the place of birth and to the place of death.

Place of birth.—The place of a man's birth has in itself no necessary connection with the place of his domicile, for though *D* be born in England, yet if *D*'s father is then domiciled in France, *D*'s domicile of origin is not English but French.⁵ If, however, nothing be known about *D*'s domicile except the fact of his birth in England, this fact is ground for a presumption that *D*'s domicile at the moment of his birth, and therefore *D*'s domicile of origin, was English.

It is, of course, on this ground that a foundling,⁶ of whom nothing is known but the fact of his being found within the limits of a particular country, *e. g.*, England, acquires a domicile of origin in that country.

Place of death.—The place of a person's death in no way of itself affects his domicile, but the fact that he was present in a particular country at the moment of his death is, in the absence of any proof to the contrary, ground for a presumption of his being then domiciled in that country.

"A man [it has been said]⁷ is *primâ facie* domiciled at the

¹ See Rules 15-18, *post*.

² Compare *In re Patience*, 1885, 29 Ch. D. 976; *Bradford v. Young*, 1885, 29 Ch. D. (C. A.) 617; *Craignish v. Hewitt*, [1892] 3 Ch. (C. A.) 180.

³ *Bruce v. Bruce*, 1790, 2 B & P. 229, 231, per Lord Thurlow.

⁴ *Bempde v. Johnstone*, 1796, 3 Ves. Jun. 198, 301, per *Loughborough*, C.

⁵ See Rule 6, p. 101, *ante*.

⁶ *Ibid*.

⁷ In an American case, *Guier v. O'Daniel*, 1 Binney's Rep. 349, note. See *Phillimore*, s. 235.

“place where he is resident at the time of his *death*; and it is incumbent on those who deny it to repel the presumption of law, which may be done in several ways. It may be shown that [*D*] was there as a traveller, or on some particular business, or on a visit, or for the sake of health; any of which circumstances will remove the impression that he was domiciled at the place of his death.”

The principle here laid down is sound. Where, indeed, there is a balance of evidence between the claims of two possible domicils, the place of a man's death is irrelevant. For “there is not a single dictum, from which it can be supposed that the place of the *death* in such a case as that shall make any difference. Many cases are cited in *Denisart* to show, that the death can have no effect; and not one, that that circumstance decides between two domicils;”¹ but if nothing which throws light on a man's domicile be known, then his death at a place is important, as giving rise to the application of the general principle that the place where a person is must, in the absence of counter evidence, be assumed to be his domicile.

RULE 14.² — When a person is known to have had a domicile in a given country he is presumed, in absence of proof of a change, to retain such domicile.

Illustration.

D is proved to have been domiciled in Scotland in 1870. If in 1879 it be alleged that *D*'s domicile is not Scotch, the person who makes this allegation must prove it. *D*'s domicile in Scotland, that is to say, is presumed to continue until a change is proved.³

Facts which are Evidence of Domicil.

RULE 15. — Any circumstance may be evidence of domi-

¹ *Somerville v. Somerville*, 1801, 5 Vesey, 749 a, 788, per Arden, M. R. See also, *Johnstone v. Beattie*, 1843, 10 Cl. & F. 42; *Craigie v. Lewin*, 1843, 3 Curt. 435.

² See *Munro v. Munro*, 1840, 7 Cl. & F. 842, 891; *Aikman v. Aikman*, 1861, 3 Macq. 854, 877; *Douglas v. Douglas*, 1871, L. R. 12 Eq. 617, 642, 643.

³ This principle of evidence must be carefully distinguished from the legal rules that every one retains his domicile of origin until another domicile is acquired, and resumes it whenever an acquired domicile is simply abandoned (see Rule 8, p. 114, *ante*). These are simply conventional rules of law, resorted to in order to maintain the general principle that no person can be without a domicile (see Rule 2, p. 94, *ante*); compare *In re Patience*, 1885, 29 Ch. D. 976, and *Bradford v. Young*, 1885, 29 Ch. D. (C. A.) 617.

cil which is evidence either of a person's residence (*factum*), or of his intention to reside permanently (*animus*), within a particular country.

Comment.

As domicile consists of, or is constituted by, residence and the due *animus manendi*, any fact from which it may be inferred either that *D* "resides," or has the "intention of indefinite residence," within a particular country is, as far as it goes, evidence that *D* is domiciled there.

"There is," it has been said, "no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his lifetime,"¹ and the cases with regard to disputed domicile bear out this dictum.

There is no transaction in the course of a person's life which the Courts have not admitted (for whatever it is worth) in evidence of his domicile.² Hence presence in a place,³ time of residence,⁴ the mere absence of proof that a domicile once acquired has been changed,⁵ the purchase of land,⁶ the mode of dealing with a household establishment,⁷ the taking of lodgings,⁸ the buying of a burial place,⁹ the deposit of plate and valuables,¹⁰ the

¹ *Drevon v. Drevon*, 1864, 34 L. J. (Ch.) 129, 133; per *Kindersley*, V. C. For the different inferences as to domicile deducible from the same facts, compare the judgment of the Court of Appeal in *Bradford v. Young*, 1885, 29 Ch. D. (C. A.) 617, with the judgment of *Pearson*, J., in the Court below, 1884, 26 Ch. D. 656.

² See especially, *Drevon v. Drevon*, 1864, 34 L. J. (Ch.) 129; *Hoskins v. Matthews*, 1856, 25 L. J. (Ch.) 689; 8 De G. M. & G. 13; *Aitchison v. Dixon*, 1870, L. R. 10 Eq. 589; *Douglas v. Douglas*, 1871, L. R. 12 Eq. 617; *Hodgson v. De Beauchêne*, 1858, 12 Moore P. C. 285; *In re Patience*, 1885, 29 Ch. D. 976; *Bradford v. Young*, 1885, 29 Ch. D. (C. A.) 617.

³ *Bruce v. Bruce*, 1790, 2 B. & P. 229; *Bempde v. Johnstone*, 1796, 3 Vesey, 198.

⁴ *The Harmony*, 1800, 2 C. Rob. 322.

⁵ *Munro v. Munro*, 1840, 7 Cl. & F. 842, 891.

⁶ *In re Capdevielle*, 1864, 33 L. J. (Ex.) 306; 2 H. & C. 985.

⁷ *Somerville v. Somerville*, 1801, 5 Vesey, 749 a.

⁸ *Craigie v. Lewin*, 1843, 3 Curt. 435.

⁹ *In re Capdevielle*, 1864, 33 L. J. (Ex.) 306; 2 H. & C. 985.

¹⁰ *Curling v. Thornton*, 1823, 2 Add. 6, 18; *Hodgson v. De Beauchêne*, 1858, 12 Moore P. C. 285.

exercise of political rights,¹ the way of spelling a Christian name,² oral or written expressions³ of intention to make a home in a particular place, or from which such an intention, or the absence of it, may be inferred, have all been deemed matters worth consideration in determining the question of a person's domicile.

While, however, it is true that there is no circumstance in a man's life which may not be used as evidence of domicile, it is also true that there are two classes of facts, viz., first, "expressions of intention," and secondly, "residence," which are entitled to special weight, as evidence of the matter⁴ which, in questions of domicile, it is generally most difficult to establish, viz., the existence of the necessary *animus manendi*, and that certain rules, though of a very general character, may be laid down as to the effect of such facts in proving the existence of such intention.⁵

RULE 16. — Expressions of intention to reside permanently in a country are evidence of such an intention, and in so far evidence of domicile.⁶

Comment and Illustration.

A person's intention with regard to residence may be inferred from his expressions on the subject. These expressions may be direct, as where *D* says or writes that it is his purpose to settle in Scotland. They may be indirect, as where *D*, by his acts, *e. g.*, the purchase of a burial ground at Edinburgh, intimates an intention of acquiring or keeping a Scotch home.

D, an English peer, who had lived for some time in France, expressed in a letter a deliberate intention of never returning to England. He also accepted the jurisdiction of a French Court, on the ground, expressed in a letter to his attorney, of his being *bonâ fide* domiciled in France, and added, "I have no domicile in England or any other country excepting the one [France] from

¹ *Brunei v. Brunei*, 1871, L. R. 12 Eq. 298.

² *Ibid.*

³ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441; *Bell v. Kennedy*, 1869, L. R. 1 Sc. App. 307; *Doucet v. Geoghegan*, 1878, 9 Ch. D. (C. A.) 441.

⁴ No special rules can be given as to the evidence of a person's residence in a particular place. Residence is a physical fact, to be proved in the same way as any other physical fact, *e. g.*, the commission of an assault. The mode, therefore, in which the fact is to be proved calls for no special notice in this work.

⁵ See Rules 16-18, *post*.

⁶ See *Hamilton v. Dallas*, 1875, 1 Ch. D. 257; *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441; *Bell v. Kennedy*, 1869, L. R. 1 S. C. App. 307.

"which I now write."¹ These expressions, combined with other circumstances, were, after *D*'s death, held to prove that he was in fact domiciled in France.

Direct expressions, however, of intention may be worth little as evidence.² The person who uses them may not know what constitutes a domicile. He may call a place his home, simply because he often lives there. He may wish to be, or to appear, domiciled in one country, while in fact residing permanently and intending so to reside, *i. e.*, being domiciled, in another. A direct statement, in short, that *D* considers himself domiciled, or to have his home in France, though it may sometimes be important, may often carry little weight. This remark specially applies to the description which a person gives of himself in formal documents, as, *e. g.*, "*D* residing in France."³

A person's purpose may be more certainly inferred from his acts than from his language. Thus the fact that *D* keeps up a large establishment in England,⁴ that he occupies a particular kind of house,⁵ that he deposits his plate and valuables there,⁶ and a hundred other circumstances, may be indicative of a purpose to live permanently in England, and, therefore, be evidence of his having an English domicile.

RULE 17. — Residence in a country is *prima facie* evidence of the intention to reside there permanently (*animus manendi*), and in so far evidence of domicile.⁷

Comment.

"Residence," though not the same as domicile, is not only one of the elements which go to make up domicile, but is also in many cases the main evidence for the existence of the other element which constitutes domicile, *viz.*, the *animus manendi*. "Residence alone has no effect *per se*, though it may be most important, as "a ground from which to infer intention."⁸ But the effect of

¹ *Hamilton v. Dallas*, 1875, 1 Ch. D. 257, 259.

² See *Doucet v. Geoghegan*, 1878, 9 Ch. D. (C. A.) 441.

³ *Attorney-General v. Kent*, 1862, 31 L. J. (Ex.) 391; 1 H. & C. 12; *Hamilton v. Dallas*, 1875, 1 Ch. D. 257; *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441.

⁴ *Somerville v. Somerville*, 1801, 5 Vesey, 749 a; *Forbes v. Forbes*, 1854, 23 L. J. (Ch.) 724; *Kay*, 341.

⁵ *Craigie v. Lewin*, 1843, 3 Curt. 435.

⁶ *Curling v. Thornton*, 1823, 2 Add. 19.

⁷ *Munro v. Munro*, 1840, 7 Cl. & F. 842; *The Harmony*, 1800, 2 C. Rob. 322. Compare *In re Patience*, 1885, 29 Ch. D. 976, and *Bradford v. Young*, 1885, 29 Ch. D. (C. A.) 617.

⁸ *Munro v. Munro*, 1840, 7 Cl. & F. 842, 877, per *Cottenham*, C.

residence as evidence depends both on the *time* and on the *mode* of residence.

Time. — Time or length of residence does not of itself constitute domicile.¹ An ambassador, for example, might reside thirty years in the country of the Court to which he is sent, without acquiring a domicile in a foreign country. Nor does the law of England, like some other systems, prescribe a definite length of residence, *e. g.*, ten years, after which a person shall be assumed to have acquired a domicile in a particular country. On the other hand, no length of time is necessary for the acquisition of a home or domicile. *D* emigrates to America, with the intention of settling there, and actually begins his residence there; he forthwith acquires an American domicile. But time, which is not an element of domicile, is the most important evidence of domicile; a residence, that is to say, by *D* for thirty years in England is strong evidence of his purpose to reside there, and therefore of his having an English domicile. This is the sense in which the following well-known passage is to be understood: —

“Time is the grand ingredient in constituting domicile. I think “that hardly enough is attributed to its effects;”² in most cases “it is unavoidably conclusive; it is not unfrequently said, that if “a person comes only for a special purpose, *that* shall not fix a “domicil. That is not to be taken in an unqualified latitude, and “without some respect had to the time which such a purpose may “or shall occupy; for if the purpose be of a nature that *may* “*probably*, or *does actually* detain the person for a great length “of time, I cannot but think that a general residence might grow “upon the special purpose. A special purpose may lead a man to “a country, where it shall detain him the whole of his life. A “man comes here to follow a lawsuit; it may happen, and indeed “is often used as a ground of vulgar and unfounded reproach (un- “founded as matter of just reproach though the fact may be true) “on the laws of this country, that it may last as long as himself. “. . . I cannot but think that against such a long residence, the “plea of an original special purpose could not be averred; it must “be inferred, in such a case, that other purposes forced themselves “upon him and mixed themselves with his original design, and im- “pressed upon him the character of the country where he resided. “Suppose a man comes into a belligerent country at or before the “beginning of a war; it is certainly reasonable not to bind him

¹ *In re Patience*, 1885, 29 Ch. D. 976; *Bradford v. Young*, 1885, 29 Ch. D. (C. A.) p. 617.

² *I. e.*, as evidence of domicile.

"too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes, and other means, to the strength of that country, I am of opinion that he could not plead his special purpose with any effect against the rights of hostility."¹

The effect of time must not be exaggerated. It is weighty as evidence, but it is not more than evidence of domicile.²

Mode.—The effect of residence in a country as evidence of a man's intention to continue residing there depends, to a great extent, on the manner of his residence.

If *D* not only lives in France but buys land there, and makes that country the home of his wife and family, there is clearly far more reason for inferring a purpose of residence on his part, than if he has merely taken lodgings in Paris, and lives there alone.

The presence, indeed, of a man's wife and family is sometimes spoken of as decisive,³ which it certainly is not; but this and various less important facts, such as the place where a man educates his children⁴ or exercises his political rights,⁵ indicate, though they do not prove, a fixed residence, and thus go to make up the evidence for domicile.

RULE 18.—Residence in a country is not even *prima facie* evidence of domicile, when the nature of the residence either is inconsistent with, or rebuts the presumption of, an intention to reside there permanently (*animus manendi*).⁶

Comment and Illustrations.

If *D* resides in France, this residence is *prima facie* evidence of his intending to reside there, and, therefore, of his having a

¹ *The Harmony*, 1800, 2 C. Rob. 322, 324, 325, per Sir *W. Scott*. It should be noticed that this passage refers to what is known as a "commercial domicile" during the period of war, and that time is of much more consequence in determining the existence of such a domicile than in determining the existence of a domicile properly so-called. See App., Note 4, *Commercial domicile in time of war*.

² See *Cockrell v. Cockrell*, 1856, 25 L. J. (Ch.) 730, 732, judgment of *Kindersley*, V. C.; *In re Grove*, 1888, 40 Ch. D. 216, 226, judgment of *Stirling*, J.

³ *Douglas v. Douglas*, 1871, L. R. 12 Eq. 617; *Forbes v. Forbes*, 1854, Kay, 341.

⁴ *Haldane v. Eckford*, 1869, L. R. 8 Eq. 631.

⁵ *Brunel v. Brunel*, 1871, L. R. 12 Eq. 297.

⁶ See *Jopp v. Wood*, 1865, 4 De G. J. & S. 616; 34 L. J. (Ch.) 212; *Hodgson v. De Beauchesne*, 1858, 12 Moore P. C. 285, 329, 330; *Urquhart v. Butterfield*, 1887, 37 Ch. D. (C. A.) 357.

French domicile; so, further, if *D*, who has been a domiciled Englishman, takes up his residence in France, the fact of his dwelling in France gives, especially if he lives there for a long time, a *primâ facie* reason for believing that he intends to make France his home, and, therefore, intends to acquire, and has acquired, a French domicile. But if *D*, having been a domiciled Englishman, resides in France under circumstances which preclude the possibility of the residence being the result of any purpose on his part to reside permanently in France (as, for example, if *D* is an English prisoner of war, kept captive in France), or which make it at any rate probable that *D* means to retain his English domicile (as where *D* lives at Paris as an English ambassador to the French Court), then *D*'s residence is no proof whatever of his intention to reside in France as his home, and he may be presumed to retain his English domicile.

The law on this point has been laid down authoritatively.

"We think that length of residence, according to its time and circumstances, raises the presumption of intention to acquire domicile. The residence may be such, so long, and so continuous, as to raise a presumption nearly, if not quite, amounting to a *præsumptio juris et de jure*; a presumption not to be rebutted by declarations of intention, or otherwise than by actual removal. Such was the case of *Stanley v. Bernes*.¹ The foundation of that decision, in this respect, was, that a Portuguese domicile had been acquired by previous residence and acts, and that mere declarations of intention to return could not be sufficient to prove an intention not to acquire a Portuguese domicile.

"In short, length of residence *per se* raises a presumption of intention to abandon a former domicile, but a presumption which may, according to circumstances, be rebutted.

"It would be a dangerous doctrine to hold that mere residence, apart from the consideration of circumstances, constitutes a change of domicile. A question which no one could settle would immediately arise, namely, what length of residence should produce such consequence. It is evident that time alone cannot be the only criterion. There are many cases in which a very short residence would constitute domicile, as in the case of an emigrant, who, having wound up all his affairs in the country of his origin, departs with his wife and family to a foreign land and settles there. In a case like that, a residence for a very brief period would work a change of domicile.

"Take a contrary case, where a man, for business or pleasure,

¹ 1831, 3 Hagg. Ecc. 373.

"or mere love of change, is long resident abroad, occasionally re-
 "turning to the country of his origin, and maintaining all his
 "natural connections with that country: the time of residence
 "would not to the same extent, or in the same degree, be proof
 "of a change of domicile.

"We concur, therefore, in the doctrine held in many previous
 "cases, that to constitute a change of domicile, there must be resi-
 "dence, and also an intention to change.

"With respect to the evidence necessary to establish the inten-
 "tion, it is impossible to lay down any positive rule. Courts of
 "justice must necessarily draw their conclusions from all the cir-
 "cumstances of each case; and each case must vary in its circum-
 "stances; and, moreover, in one, a fact may be of the greatest
 "importance, but in another, the same fact may be so qualified
 "as to be of little weight."¹

Domicil of particular classes of persons. — The principle laid
 down in the passages cited explains, without recourse to any
 special rule of law, the position of most of the persons supposed
 to have a, so-called, necessary domicile.²

These persons are : —

1. *Prisoners ;*
2. *Convicts ;*
3. *Exiles or refugees ;*
4. *Lunatics ;*
5. *Invalids residing abroad on account of health ;*
6. *Officials generally ;*
7. *Ambassadors ;*
8. *Consuls ;*
9. *Persons in military or naval service ;*
10. *Persons in Indian service ;*
11. *Servants ;*

¹ *Hodgson v. De Beaucheme*, 1858, 12 Moore P. C. 285, 329, 330, *per Curiam*. Compare *Jopp v. Wood*, 1865, 4 De G. J. & S. 616, 621, 622, *per Turner*, L. J.

² "A necessary domicile" is in strictness a domicile not determined by the purpose or choice of the party, but by the direct operation of some rule of law; such, for example, is the domicile of a wife or of a minor.

The term, however, "necessary domicile," is sometimes applied to the case of persons such as prisoners and ambassadors. This application of the term is erroneous. The peculiarity (if any) in the position of such persons consists in the fact that their residence in a particular country either cannot be, or is not, combined with the *animus manendi*, and therefore gives no ground for inferring that they have a domicile in such country.

12. *Ecclesiastics* ;13. *Students*.¹

(1) *A Prisoner*. — A prisoner retains, during imprisonment, the domicile which he possessed at its commencement. He cannot form any purpose or intention as to his residence in the place where he is imprisoned.

D, a domiciled Irishman, was imprisoned in England. "It could not," it was laid down, "be supposed that he acquired a domicile in England by residence within the walls of the King's Bench Prison. *All such residence goes for nothing*."²

(2) *A Convict*. — A person transported to a particular country for life absolutely loses (it is said) his original domicile. It is certainly possible that, in this instance, "the domicile of origin may be extinguished by act of law."³ A sentence, further, of transportation,⁴ *e. g.*, to Van Dieman's Land, may probably have been looked upon as an order that the convict should reside, and make his home in Van Dieman's Land, *i. e.*, be domiciled there; but there seems to be no English decision on the subject, and in the absence of any such decision doubt may be entertained whether there be any real distinction between the position of a convict, and of a prisoner. A person, at any rate, transported for years, ought, it would seem, like a prisoner, to retain the domicile which he possessed at the beginning of his imprisonment.

Supposing, however, that a sentence of transportation destroys a man's domicile of origin, it is probable that no Courts, other than those of the sovereign inflicting the sentence, would give this effect to it. French *émigrés* were treated by our Courts as retaining their domicile of origin.⁵

¹ As to domicile of these persons, see *Phillimore*, ss. 67-72, 133-200; *Wharton*, ss. 47-54; *Jacobs*, ss. 264-340. *Phillimore*, whose treatment of the subject is ample, sometimes appears to consider that the domicile of these persons is fixed by a rule of law, whereas in general, according to English law, at any rate, their domicile (it is submitted) results simply from the application to their peculiar circumstances of the ordinary rules regulating the change and acquisition of domicile.

² *Burton v. Fisher*, 1826, Milward's Reps. 183, 191, 192.

The case itself does not decide more than that *D* did not, as a fact, acquire an English domicile, but the principle contained in the words underlined is clearly sound; *Phillimore*, ss. 186, 187.

³ *Udny v. Udny*, L. R. 1 Sc. App. 441, 458. See *Phillimore*, s. 191.

⁴ See, however, as to abolition of sentences of transportation, 16 & 17 Vict. cap. 99; 20 & 21 Vict. cap. 3.

⁵ See *De Bonneval v. De Bonneval*, 1838, 1 Curt. 856; *In Goods of Duchess d'Orleans*, 1859, 1 Sw. & Tr. 253.

(3) *An Exile or Refugee*.¹—An exile cannot dwell in his own country (*e. g.*, France), but he is not compelled to live in England. His residence, however, in England, certainly affords no presumption of an intention to adopt an English home. Mere residence, therefore, during the time of his exile, however long, does not give him an English domicile.

D, a French *émigré*, left France, his domicile of origin, in 1792. After a short residence in Germany, he resided in England till 1815, when he was able to return and did return to France. From 1815 to 1821, he resided generally in France. In 1821, *D* bought a house in London. In 1834, he occupied this house, and lived there till his death. *D*, it was held, never acquired an English domicile, but retained his French domicile at the time of his death.²

This case decides, not (as is sometimes supposed) that an exile *cannot* acquire a domicile in his adopted country, but only that the bare fact of his residence there does not give him a domicile. A refugee, probably, may acquire a domicile in a foreign country, if he chooses to adopt it as his home,³ and, of course, may acquire a domicile in a foreign country by remaining there after his restoration to his own country has become possible.

(4) *A Lunatic*.⁴—There are two views as to the position of a lunatic when under control.

The first is, that he retains the domicile which he possessed at the time he became insane, or, more strictly, when he began to be legally treated as insane. This is the sound view, and is favoured by the English cases on the subject.⁵ If this view be correct, the lunatic under confinement is in the same position as a prisoner. He cannot exercise choice, or will. He cannot, therefore, acquire a domicile. Hence he retains his existing domicile.⁶ *D*, for example, is an Englishman, who becomes lunatic, and is under control. He is taken to Scotland, and placed in a Scotch asylum.

He remains there until his death. He retains, on this view, his English domicile. The time in the asylum counts for nothing.

The second view is, that a lunatic is a person not *sui juris*, who stands in somewhat the same relation to his committee as a child

¹ *Phillimore*, ss. 192–200; *Westlake*, s. 279; *Wharton*, s. 54; *Savigny*, s. 353, p. 56, note (q).

² *De Bonneval v. De Bonneval*, 1838, 1 Curt. 856.

³ Compare *Heath v. Samson*, 1851, 14 Beav. 441.

⁴ *Westlake*, 3rd ed., p. 301; *Phillimore*, ss. 134–139 b; *Wharton*, ss. 52, 53.

⁵ See *Bempde v. Johnstone*, 1796, 3 Ves. Junr. 198; *Hepburn v. Skirving*, 1861, 9 W. R. 764; *Urquhart v. Butterfield*, 1887, 37 Ch. D. (C. A.) 357.

⁶ See Rule 4, p. 98, *ante*.

to his father, and that, therefore, his domicile can be fixed by his committee.¹ This view is favoured by some American cases,² but is open to objection. In the case of father and child, the infant's domicile follows that of the father, but a father cannot give his son a domicile apart from his own. In the case of a committee and a lunatic, it appears to be maintained, not that a lunatic's domicile follows that of the committee, but that it can be fixed by the committee, or, in effect, that a committee has greater power over the domicile of a lunatic, than a father over that of his son. If the position of a committee be compared to that of a guardian, then it must be remarked that the power of a guardian to change a ward's domicile is itself doubtful.³

On the whole, the first view appears to be (at least under ordinary circumstances) the right one. The second arises from a confusion between the power to change a lunatic's residence and the right to change his domicile.

(5) *An Invalid*.—There is at first sight considerable difficulty in determining whether *D*, an Englishman, who resides abroad on account of his health, loses his English domicile or not. For there exists an apparent inconsistency between the different judicial dicta on the subject.

On the one hand, it has been laid down that such a residence, being "involuntary," does not change *D*'s domicile.

"There must," it has been said, "be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the *relief from illness*." ⁴

"A man might leave England with no intention of returning, nay, with a determination never to return, *e. g.*, a man labouring under mortal disease, and told that to preserve his life, or even to alleviate his sufferings, he must go abroad. Was it to be said that if he went to Madeira he could not do so without losing his character of an English subject — without losing the right to the intervention of the English law in the transmission of his property after his death and in the construction of his testamentary instruments? Such a proposition was revolting to common sense." ⁵

¹ See *Sharpe v. Crispin*, 1869, L. R. 1 P. & D. 611, 617, 618, which, however, does not decide this point.

² See *Wharton*, s. 52.

³ See *Story*, s. 506, note (1), and pp. 124, 125, *ante*.

⁴ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 458, per Lord Westbury.

⁵ *Moorhouse v. Lord*, 1863, 32 L. J. (Ch.) 295, 299; 10 H. L. C. 272, 292, per Lord Kingsdown.

This doctrine has been thus applied to a particular case: "If [*D*] had gone for her health to the island of Madeira, . . . and had written letters, stating that she should die there, and had given directions that she should be buried there, [then] although she had died and been buried there, unquestionably her Scotch domicile would never have been superseded."¹

On the other hand, it has been maintained that if *D* chooses to reside abroad with the intention of making the foreign country his residence permanently, or for an indefinite time, the fact that the motive of the change is health does not prevent *D* from changing his domicile. In a case of this kind the law has been judicially expounded as follows:—

"That there may be cases in which even a permanent residence in a foreign country, occasioned by the state of the health, may not operate a change of domicile, may well be admitted. Such was the case put by Lord Campbell in *Johnstone v. Beattie*, but such cases must not be confounded with others in which the foreign residence may be determined by the preference of climate, or the hope or the opinion that the air or the habits of another country may be better suited to the health or the constitution. In the one case, the foreign abode is determined by necessity; in the other, it is decided by choice. . . . In settling [in Tuscany, *D*] was exercising a preference, and not acting upon a necessity; and I cannot venture to hold that in such a case the domicile cannot be changed. If domicile is to remain unchanged upon the ground of climate being more suitable to health, I hardly know how we could stop short of holding that it ought to remain unchanged also upon the ground of habits being more suitable to fortune. There is in both cases a degree of moral compulsion."²

The apparent inconsistency between these doctrines may be removed, or explained, if we dismiss all reference to motive, to external necessity, and so forth; avoid the use of the misleading terms "voluntary" and "involuntary," and, recurring to the principle that residence combined with the purpose of permanent or indefinite residence constitutes domicile, apply it to the different cases or circumstances under which a domiciled Englishman may take up a foreign residence for the sake of his health.

These cases are three:—

First case.—*D* goes to France for relief from sickness, with

¹ *Johnstone v. Beattie*, 1843, 10 Cl. & F. 42, 139, per Lord Campbell.

² *Hoskins v. Matthews*, 1856, 8 De G. M. & G. 13, 28, 29; 25 L. J. (Ch.) 689, 695, per Turner, L. J.

the fixed intention of residing there for six months and no longer.

This case presents no difficulty whatever. *D* does not acquire a French domicile any more than he does if he goes to France for six months on business or for pleasure. The reason why he does not acquire a domicile is that he has not the *animus manendi*, but the quite different intention of staying for a determinate time or definite purpose.

Second case. — *D*, finding that his health suffers from the English climate, goes to France and settles there, that is, he intends to reside there permanently or indefinitely. *D* in this case acquires a French domicile.¹

Here, again, there is no deviation from general principle. *D* acquires a French domicile because he resides in France with the *animus manendi*.

Third case. — *D* goes to France in a dying state, in order to alleviate his sufferings, without any expectation of returning to England.

This is the case which has suggested the doctrine that a change of residence for the sake of health does not involve a change of domicile. The doctrine itself, as applied to this case, conforms to common sense. It would be absurd to say that *D*, who goes to Pau to spend there in peace the few remaining months of his life, acquires a French domicile. But the doctrine in question, as applied to this case, is in conformity, not only with common sense, but with the general theory of the law of domicile. *D* does not acquire a domicile in France, because he does not go to France with the intention of permanent or indefinite residence, in the sense in which these words are applied to a person settling in another country, but goes there for the definite and determinate purpose of passing in France the few remaining months of his life. The third case, now under consideration, is in its essential features like the first, and not like the second, of the cases already examined. If *D* knew for certain that he would die precisely at the end of six months from the day when he left England, it would be apparent that the first case and the third case were identical. That the definite period for which he intends to reside is limited, not by a fixed day, or by the conclusion of a definite piece of business, but by the expected termination of his life, can make no difference in the character of the residence. In neither the first nor the third case is the residence combined with the proper *animus manendi*.

¹ This is precisely what *Hoskins v. Matthews*, 1856, 25 L. J. (Ch.) 689; 8 De G. M. & G. 13, decides, and decides correctly.

In no one of the three cases we have examined is there any necessity, in order to arrive at a right conclusion, for reference to the motive, as contrasted with, what is quite a different thing, the purpose or intention of residence.

We may now see that the contradictory dicta as to the effect of a residence for the sake of health do not of necessity imply any fundamental difference of opinion among the high authorities by whom these dicta were delivered. All these authorities might probably have arrived at the same conclusion, if they had had the same circumstances before their minds.

The Court which gave judgment in *Hoskins v. Matthews*¹ had to deal with the second of our supposed cases, and arrived at what, both according to common sense and according to theory, is a perfectly sound conclusion.

The dicta, on the other hand, of the authorities who lay down that a residence adopted for the sake of health does not involve a change of domicile, are obviously delivered by persons who had before their minds the third, not the second, of our supposed cases. These dicta, again, embody what, in reference to such a case, is, as we have shown, a perfectly sound conclusion. Their only defect is that they are expressed in terms which are too wide, and which therefore cover circumstances probably not within the contemplation of the authorities by whom they were delivered; and, further, that, while embodying a sound conclusion, they introduce an unnecessary and misleading reference to the motives which may lead to the adoption of a foreign domicile.

(6) *Officials generally.* — Official residence in a country is not in itself evidence of an intention to settle there, because all that can (in general) be inferred from such residence is that the official resides during the time and for the purpose of his office. This is clearly so when the office is held for a limited period. There is no reason to infer from the fact of a domiciled Englishman becoming Lord Lieutenant of Ireland, or Governor-General of India,² that he means to give up his English home or domicile. The presumption is strongly (if not conclusively) in favour of his intending to retain his English domicile.

Occasionally, however, official residence may be *primâ facie* proof of a change of domicile. This is so when the office itself, from its tenure and nature, requires the official to make a home in the country where he resides. Thus, it has been suggested that if a domiciled Scotchman takes an English living, he may, on com-

¹ 25 L. J. (Ch.) 689; 8 De G. M. & G. 13.

² See *Attorney-General v. Pottinger*, 1861, 6 H. & N. 733; 30 L. J. (Ex.) 284.

ing into residence, be assumed to have the intention of residing permanently in England, and hence to acquire an English domicile.¹ Such a case is exceptional. As a rule, official residence is not a fact from which a change of domicile can be inferred, but much depends on the nature of the office.

(7) *An Ambassador*.² — An ambassador who represents his sovereign at a foreign court in general retains his existing domicile, which is, in most cases, the country the sovereign whereof he represents.

The reason of this is obvious. The residence of an English ambassador in France does not raise the slightest presumption of his intention to make his home in France, and it is possible, though not certain, that the duties of an ambassador may be held absolutely incompatible with his *acquiring* a domicile in the country where he resides whilst he remains an ambassador.

An ambassador, however, if he is before his appointment already domiciled in the country where he resides as ambassador, retains his domicile in spite of his office, and this, though the domicile in the place of his residence is an acquired domicile, and the country which he represents is his domicile of origin. *D*, an Italian, acquires a domicile in England. He afterwards is appointed the representative of Italy at the English court. *D* retains his English domicile.³ Though, in short, an ambassador or *attaché* does not in general acquire a domicile in the country where he resides, this is simply the result of his residence being in general unconnected with any intention to reside permanently. In a case where it was held that an *attaché* to the Portuguese Embassy retained the English domicile, which he had acquired before his appointment, the Court say, "We are not saying that if a man should have continued an *attaché* for forty or fifty years, that he would thereby, *simpliciter*, acquire an English domicile, and that his property would be subject to legacy duty. We affirm nothing of the sort. What we do affirm is, that he, having acquired an English domicile, does not lose it *ipso facto*, without more, by taking this office of an *attaché*."⁴

(8) *A Consul*. — A consul does not and cannot be presumed to acquire a domicile by merely living in a country as consul. On the other hand, he does not, by becoming consul, lose any domicile

¹ See judgment of Lord Jeffrey in *Arnott v. Groom*, 1846, 9 D. 142, 149-152.

² *Phillimore*, ss. 171-178; *Story*, s. 48.

³ *Heath v. Samson*, 1851, 14 Beav. 441.

⁴ *Attorney-General v. Kent*, 1862, 31 L. J. (Ex.) 391, 397, per Bramwell, B.

he already possesses. The length of his residence as consul is immaterial.¹

D, an Englishman, resides at Leghorn for twenty years as English consul. *D* does not acquire an Italian domicile.

(9) *A Person in military or naval service.*—A soldier does not acquire a domicile in the place where he is stationed, but is domiciled in the territory of the sovereign whom he serves.

The first part of this principle results from the nature of modern military service. A soldier does not, and in fact cannot, acquire a domicile in the place where he is stationed.² For *D*, an English soldier serving in Canada, cannot, during his service, however long, “settle” in Canada.

The second part of this principle is not supported by many cases, but is, it is conceived, so far well established that we may presume, unless there is evidence to the contrary, that a soldier or sailor (in the naval service) is domiciled in the country of the sovereign whom he serves, i. e., that he means to have his home within the territory of that sovereign, or at least not within the territory of any other power.

Hence the following results:—

(i) *A soldier or sailor in the service of his own sovereign retains the domicile which he had on entering the service, wherever he may be stationed.*³

D, an Irish officer, though stationed in England, retains his Irish domicile of origin.

D, whose domicile of origin is English, acquires a domicile of choice in the Isle of Man. He enters the army and is stationed in Canada. He retains his Manx domicile of choice.⁴

(ii) *A person who enters the military or naval service of a foreign sovereign (probably) acquires a domicile in the country of such sovereign.*

¹ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441; *Sharpe v. Crispin*, 1869, L. R. 1 P. & D. 611; *The Indian Chief*, 1801, 3 C. Rob. 12, 22; *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1.

² See judgment of *Watson*, B.; *Re Steer*, 1858, 28 L. J. (Ex.) 22, 25.

³ This statement is approved by *Lindley*, L. J., *Ex parte Cunningham*, 1884, 13 Q. B. D. (C. A.) 418, at p. 425. The statement applies no less to a domicile of choice (*In re Macreight*, 1885, 30 Ch. D. 165) than to a domicile of origin. See *Yelverton v. Yelverton*, 1859, 1 Sw. & Tr. 574; 29 L. J. (P. & M.) 34. Compare *Attorney-General v. Napier*, 1851, 6 Ex. 217; 20 L. J. (Ex.) 173; *Brown v. Smith*, 1852, 15 Beav. 444; 21 L. J. (Ch.) 356; with *Craigie v. Lewin*, 1843, 3 Curt. 435. See *Firebrace v. Firebrace*, 1878, 4 P. D. 63, 65, 66; *Ex parte Barne*, 1886, 16 Q. B. D. (C. A.) 522, and *Westlake*, 3rd ed., pp. 317–319, ss. 273, 274.

⁴ *In re Macreight*, 1885, 30 Ch. D. 165.

D, a domiciled Englishman, enters the Russian army, and dies while serving in it. He, perhaps, may be presumed to have acquired a Russian domicil.¹ A soldier or sailor who serves a foreign sovereign certainly does not acquire a domicil at the particular place where he is stationed.

A question has further been raised, and not settled, whether a soldier who retains his rank in the service of one sovereign can, even by residence combined with the *animus manendi*, acquire a domicil in a country subject to another.

The Privy Council thus express themselves on this point:—

“We do not think it necessary for the decision of this case, that we should lay down as an absolute rule that no person being the colonel of a regiment in the service of the East India Company, and a general in the service of her Majesty, can legally acquire a domicil in a foreign country. It is not necessary, for the decision of this case, to go so far; but we do say that there is a strong presumption of law against a person so circumstanced abandoning an English domicil and becoming the domiciled subject of a foreign power.”²

The matter becomes, in short, a question of evidence. There is the strongest presumption that *D*, who is in the service of the English Crown, does not, even though he resides in France, mean to reside there permanently, but this presumption probably might be rebutted by sufficiently strong evidence.³

(10) *A Person in the Indian service.*—The rules established with reference to the domicil of persons in the service of the East India Company were peculiar,⁴ and are now admitted to have been anomalous.

¹ See this statement made *arguendo* in *Somerville v. Somerville*, 1801, 5 Vesey, 749 a, 757, and apparently admitted by the Court. Compare also cases such as *Craigie v. Lewin*, 1843, 3 Curt. 435, as to service under the East India Company, and *Westlake*, pp. 313–315. There may be a difficulty in applying this doctrine in the case of states made up of several countries.

² *Hodgson v. De Beauchesne*, 1858, 12 Moore P. C. 285, 319. Conf. *Bremer v. Freeman*, 1857, 10 Moore P. C. 306.

³ *Attorney-General v. Pottinger*, 1861, 30 L. J. (Ex.) 284, which, however, is not decisive.

⁴ See *Phillimore*, ss. 154–162; *Bruce v. Bruce*, 1790, 2 B. & P. 229, (n); *Munroe v. Douglas*, 1820, 5 Madd. 379; *Craigie v. Lewin*, 1843, 3 Curt. 435; *Attorney-General v. Napier*, 1851, 6 Ex. 217; 20 L. J. (Ex.) 173; *Forbes v. Forbes*, 1854, 23 L. J. (Ch.) 724; *Kay*, 341; *Hepburn v. Skirving*, 1861, 9 W. R. 764; *Hodgson v. De Beauchesne*, 1858, 12 Moore P. C. 285; *Attorney-General v. Pottinger*, 1861, 30 L. J. (Ex.) 284; 6 H. & N. 733; *Cockrell v. Cockrell*, 1856, 25 L. J. (Ch.) 730; *Attorney-General v. Fitzgerald*, 1856, 25 L. J. (Ch.) 743; 3 Drew. 610; *Allardice v. Onslow*, 1864, 33 L. J. (Ch.) 434;

(i) A person in the military or covenanted service of the Company acquired a domicile in India.¹

(ii) The domicile thus acquired was technically termed and considered an "Anglo-Indian domicile."²

Such a domicile was, for testamentary purposes (to which the cases mostly refer), equivalent to an English domicile.³

(iii) The Anglo-Indian domicile was in general retained after a person's return to Europe as long as he continued in the service of the Company and liable to be recalled to India, but such continuance was not absolutely incompatible with the acquisition or resumption of another domicile, *e. g.*, in England.⁴

(iv) The rules as to an Anglo-Indian domicile did not apply either to persons residing in India for the sake of business,⁵ or to persons in the service of the Crown, and stationed in India.⁶

These rules worked as follows: *D*, a domiciled Scotchman, went to India as a military officer or a surgeon in the service of the Company. Whilst in India, or during a return on furlough to Scotland, he made his will, and died, say, in the year 1850. The will was made in accordance with the forms required by Scotch law, but not in accordance with the forms required by English law. The will was invalid. *D*, in virtue of his Anglo-Indian domicile, was in effect considered a person domiciled in England, and the validity of his will was determined on the principles applicable to the will of a domiciled Englishman.

The rules as to Anglo-Indian domicile were in two respects anomalous.

First. A soldier stationed in India in the service of the Company acquired a domicile in the country where he was stationed.⁷

Jopp v. Wood, 1865, 34 L. J. (Ch.) 212; 4 De G. J. & S. 616. The transfer of the government of India to the Crown by the Act for the better Government of India, 21 & 22 Vict. cap. 106, and the Indian Succession Act, 1865 (Act No. X.), have deprived these cases of most of their practical importance. Compare the Indian Succession Act, 1865, ss. 10, 11, and the Scotch case, *Wauchope v. Wauchope*, June 23, 1877, 4 Rettie, 945.

¹ See cases cited in foregoing note.

² As to expression "Anglo-Indian domicile," see judgment of *Cranworth*, Ch., *Moorhouse v. Lord*, 1863, 32 L. J. (Ch.) (H. L.) 295, 298. Compare *In re Tootal's Trusts*, 1883, 23 Ch. D. 532 (which shows that there cannot be an Anglo-Chinese domicile), and *Abd-ul-Messih v. Farra*, 1888, 13 App. Cas. 431.

³ *Bruce v. Bruce*, 1790, 2 B. & P. 229; *Munroe v. Douglas*, 1820, 5 Madd. 379.

⁴ *Attorney-General v. Pottinger*, 1861, 30 L. J. (Ex.) 284.

⁵ *Jopp v. Wood*, 1865, 4 De G. J. & S. 616; 34 L. J. (Ch.) 212.

⁶ *Attorney-General v. Napier*, 1851, 6 Ex. 217; 20 L. J. (Ex.) 173.

⁷ See p. 148, *ante*.

Secondly. A person was held domiciled in a country where he certainly did not, in ninety-nine cases out of a hundred, intend to make his permanent home, and, therefore, where he would not in any other case have been held to be domiciled.¹

The explanation of the anomaly is not far to seek. "At the time when those cases [on Anglo-Indian domicile] were decided, the government of the East India Company was, in a high degree, if not wholly, a separate and independent government, foreign to the government of this country; and it may well have been thought that persons who had covenanted obligations with such government for service abroad, could not reasonably be considered to have intended to retain their domicile here. *They in fact became as much estranged from this country, as if they had become the servants of a foreign government.*"²

A servant of the Company gained an Anglo-Indian domicile, not because he was stationed in India, but because he entered into the service of what may be termed an Anglo-Indian power. This explains the fact that neither merchants nor persons in the military service of the Crown were held to have acquired an Anglo-Indian domicile.³

(11) *An Ecclesiastic.* — A clergyman possessed of a cure must (it is said) be held domiciled at the place of his cure.⁴

The most that can be laid down is that there is a strong presumption in favour of his intention to reside there permanently. There is no reason to suppose that if the intention did not in fact exist the presumption might not be rebutted.

(12) *A Servant.* — A servant (it is sometimes laid down) has the domicile of his master.

There is not, however, any authority in English law, or anything in the circumstances of modern life, establishing a definite rule, or even a presumption, as to the domicile of a servant. Whether he has, or has not, a "permanent home" in the same country as his master must, as in other cases, depend upon the combination of fact and intention. The nature of the service may, under some circumstances, tell in favour, and in others

¹ Conf. language of *Kindersley*, V. C.; *Allardice v. Onslow*, 1864, 33 L. J. (Ch.) 434, 436.

² *Jopp v. Wood*, 1865, 34 L. J. (Ch.) 212, 219, per Turner, L. J.

³ *Westlake* maintains a different doctrine as to the theory on which rest the rules as to an Anglo-Indian domicile. See especially, *Westlake*, 3rd ed., pp. 314, 315, s. 265.

⁴ *Phillimore*, s. 184.

against a presumption, that the servant adopts his employer's domicile.¹

(13) *A Student*.—There is certainly in English law nothing to justify any peculiar rule or presumption as to the domicile of a student.

As to the domicile of the foregoing classes of persons, the following points may be noticed :—

First. Several of the cases enumerated, such, *e. g.*, as that of an ecclesiastic, a servant, or a student, present, in fact, no peculiarity whatever. The legal home of these persons is clearly fixed in accordance with the ordinary principles of the law of domicile.

Secondly. The other cases have most of them these features in common, that each of the persons, such as a prisoner, or an ambassador, has a residence in one place, and a domicile in another; and that the residence exists under circumstances which preclude any presumption in favour of the existence of a domicile at the place of residence; but this will be found to result not from any special rule of law fixing the domicile of the persons in question, but from the fact that the circumstances of their respective positions, either, as in the case of a prisoner, make the existence of the *animus manendi* impossible, or, as in the case of an exile, render its existence improbable. It is, of course, true that a person who is residing in a country, where for any reason he cannot or does not acquire a domicile, is, in accordance with the general rules of the law of domicile, unable to change the domicile which he possessed on coming to the country where he resides;² but his domicile is in no special sense determined by law, and cannot, therefore, be termed with any strictness of language a necessary domicile.

Thirdly. It is often said that the reason why, in some of the cases under consideration, and in others which might be mentioned, residence does not produce domicile is that the residence is “involuntary,” or “under compulsion.”

What is intended by these expressions is no doubt true, *viz.*, that where residence cannot be, or is not, a consequence or a result of a purpose or intention to reside indefinitely (*animus manendi*), there cannot be a change of domicile; but the terms “involuntary,” or “under compulsion,” are so ambiguous, and so

¹ Contrast, for example, the position of a Scotchman settled as a gardener in England, with that of a Frenchman, employed as courier by an English family, travelling abroad on the Continent. See *Phillimore*, ss. 140–148.

² See Rules 5 to 8, pp. 99–114, *ante*.

closely connected with logical and metaphysical problems, that they may lead, and have in fact led to confusion. Hence it has been laid down that "there must be a residence freely chosen, "and not prescribed or dictated by any external necessity, such "as the duties of office, the demands of creditors, or the relief "from illness,"¹ whence it might be inferred that the effect of residence in producing a change of domicile depends not upon the presence or absence of the *animus manendi*, but upon the motive for the residence. This doctrine, which has already perplexed the discussion of the effect of residence abroad for the sake of health, must, unless rejected, lead to still further perplexity. It at once, for example, suggests the inquiry whether an Englishman, who resides abroad for the sake of economy, and therefore in one sense against his will, acquires a foreign domicile. This question, and the like inquiries, which can never be answered by a reference to motive, are disposed of by adhering to the sound principle that residence and the *animus manendi* are the sole constituents of domicile. If these exist, the motive for the residence becomes immaterial. The only way in which consideration of a person's motive for dwelling in one place rather than in another can be important is from its effect as evidence for the existence or non-existence of the *animus manendi*. In all the cases mentioned, of residence induced, *e. g.*, by desire to escape from illness, or by the necessity for performing official duties, it is only as evidence of intention that motive is of importance. If this once be perceived, it will be found best, as already suggested, to avoid as far as possible all reference to the question whether residence be voluntary or involuntary, except in so far as a man's willingness or unwillingness to reside in a country may be proof of his intending or not intending to make it his permanent dwelling place.

Fourthly. When the term involuntary, or under compulsion, is got rid of, and the true relation between motive and residence is perceived, we see how it happens that official residence is referred to, sometimes as a reason against, and sometimes as a reason for, assuming the acquisition of domicile.

We have here to deal with a question of evidence. If the "official residence" is residence for a limited time, or for a special purpose, as in the case of a Governor-General of India, the nature of the office does away with the presumption in favour of the existence of the *animus manendi*. If, on the contrary, the office is one, such as is in modern times an ecclesiastical cure,

¹ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 458, per Lord Westbury.

which makes it a duty for the person holding the office to fix his home permanently in a particular place, then the nature of the office adds to the strength of the presumption that he intends to make his home in the place where, for the discharge of his official functions he, resides.

(B) DOMICIL OF LEGAL PERSONS OR CORPORATIONS.

RULE 19.¹—The domicile of a corporation is the place considered by law to be the centre of its affairs, which

- (1) in the case of a trading corporation, is its principal place of business, *i. e.*, the place where the administrative business of the corporation is carried on,
- (2) in the case of any other corporation, is the place where its functions are discharged.

Comment.

The conception of a home or domicile, depending as it does on the combination of residence and intention to reside,² is, in its primary sense, applicable only to human beings; but by a fiction of law, an artificial domicile may be attributed to legal beings, or corporations.

The following observations as to such an artificial domicile are worth notice :—

First. The domicile of a corporation is entirely distinct from the domicile of the persons who compose the corporation. Thus the London and North-Western Railway Company has its domicile in England.³ Its shareholders reside in England, France, Italy, etc., and have their domicils in different countries.

Secondly. As regards the domicile of a corporation, the distinction between residence and domicile does not in general exist.

Thirdly. The domicile of a corporation must be fixed at a definite place within a given country. The Cesena Sulphur Company is domiciled in England, because its domicile is fixed at a particular place in London.

¹ 2 *Lindley, Company Law*, 5th ed., App. 1, pp. 910, 911; *Savigny*, s. 354; *Westlake*, 3rd ed., pp. 332–339. See *Jones v. Scottish Accident Insurance Co.* 1886, 17 Q. B. D. 421; *Watkins v. Scottish Imperial Insurance Co.* 1889, 23 Q. B. D. 285.

² See pp. 80–84, *ante*.

³ See *Calcutta Jute Company v. Nicholson*, 1876, 1 Ex. D. 428, 446. Conf. *Attorney-General v. Alexander*, 1874, L. R. 10 Ex. 20.

Fourthly. There is this essential difference between the domicile of a natural person and the domicile of a corporation. The domicile of a human being is a fact which, on certain points, subjects him to the law of a particular country. The domicile of a corporation is a fiction suggested by the fact that a corporation is, on certain points, *e. g.*, the jurisdiction of the Courts, subject to the law of a particular country. A man, that is to say, is in some respects subject to the law of England because he has in fact an English domicile; a corporation is by a fiction supposed to have an English residence or domicile because it is in certain respects subject to the law of England. Hence a corporation may very well be considered domiciled, or resident, in a country for one purpose and not for another, and hence too the great uncertainty as to the facts which determine the domicile, or residence, of a corporation. In each case the particular question is not, at bottom, whether a corporation has in reality a permanent residence in a particular country, but whether, for certain purposes (*e. g.*, submission to the jurisdiction of the Courts or liability to taxation), a corporation is to be considered as resident in England, or in some other country.¹

Trading Corporations.

The residence and domicile of an incorporated trading company are determined by the situation of its principal place of business.

By the principal place of business is meant the place where the administrative business of the company is conducted. This may not be the place where its manufacturing or other business operations are carried on.²

Thus if a company incorporated under the Companies' Acts, 1862 to 1890, for the carrying on of manufactures in India, has a registered office in England, and its affairs are conducted in England, the company is domiciled in England, not in India, and a company whose registered office is in Scotland is domiciled in

¹ Contrast, for example, the decisions as to the residence of a corporation under the Income Tax Act, 1853, s. 2, sched. D; *Cesena Sulphur Co. v. Nicholson*, 1876, 1 Ex. D. 428; *Imperial Continental Gas Association v. Nicholson*, 1877, 37 L. T. 717; *London Bank of Mexico, &c. v. Aphorpe*, [1891] 2 Q. B. (C. A.) 378, with decisions as to the domicile or ordinary residence of a corporation under Rules of Court, 1883, Ord. XI. r. 1, sub-s. (e); *Jones v. Scottish Accident Insurance Co.* 1886, 17 Q. B. D. 421; *Watkins v. Scottish Imperial Insurance Co.* 1889, 23 Q. B. D. 285.

² *Lindley, Company Law*, 5th ed., App. 1, pp. 910, 911. Conf. *Taylor v. Crowland Gas Co.* 1855, 11 Ex. 1; 23 L. J. (Ex.) 254; *Adams v. G. W. Ry. Co.* 1861, 6 H. & N. 404; *Corbett v. General Steam Navigation Co.* 1859, 4 H. & N. 482.

2. (Rule 1.) NATIONAL AND MUNICIPAL DOMICIL. — In the American cases a distinction is sometimes made, implicitly as well as explicitly, between domicile with reference to an independent country, and domicile with reference to a political division of a country. The former is called national domicile; the latter, municipal domicile. Jacobs also uses the term quasi-national domicile, to indicate "that domicile which has for its seat a quasi-autonomous state, — such as the States of this Union, or the various countries and colonies composing the realm of Great Britain." *Law of Domicil*, ss. 77, 207, 362. In discussing quasi-national domicile, however, the courts generally use the term "national domicile." *Talbot v. Chamberlain*, 149 Mass. 57, 20 N. E. 305. In all these cases, the fundamental idea of domicile, that of home, is preserved. *Cass v. Gunnison*, 68 Mich. 147. But, in the case of municipal domicile, there is a tendency to give greater weight to mere residence or personal presence, and to recognize more readily a change of domicile, than in the case of national domicile. *Putnam v. Johnson*, 10 Mass. 488; *Wilbraham v. Ludlow*, 99 Mass. 587; *North Yarmouth v. West Gardiner*, 58 Me. 211; *Ludlow v. Szold* (Iowa), 57 N. W. 676. To a less extent the same thing may be said as to quasi-national domicile. *Wheeler v. Hollis*, 19 Tex. 522; *Merrill's Heirs v. Morrisett*, 76 Ala. 433; *Hicks v. Skinner*, 72 N. C. 1; *First Nat. Bank v. Balcom*, 35 Conn. 351.

3. (Rule 1.) COMMERCIAL DOMICIL. — In *United States v. Chin Quong Look*, 52 Fed. Rep. 203 (1892), a case arising under the Chinese Exclusion Act, the court, construing *Lau Ow Bew v. United States*, 144 U. S. 47 (1892), rejected the test of personal domicile, and acted upon the theory of commercial domicile as applied in prize cases. But, in the case of *Lau Ow Bew*, the facts as agreed upon were that he had been domiciled in the United States for seventeen years; that his absence from the United States, which, at the time of his return thereto, had continued for less than a year, was temporary, for the purpose of visiting his relatives; and that he left the United States "with the intention of returning as soon as possible." On these facts the Supreme Court said: "We are of opinion that it was not intended that commercial domicile should be forfeited by temporary absence at the domicile of origin, nor that resident merchants should be subjected to loss of rights guaranteed by treaty, if they failed to produce from the domicile of origin that evidence which residence in the domicile of choice may have rendered it difficult if not impossible to obtain." *Lau Ow Bew v. United States*, 144 U. S. 47, 63; see, also, p. 62. The term "commercial domicile" seems to have been used merely as descriptive of the domicile of choice of *Lau Ow Bew*, who was a merchant. See *Fong Yue Ting v. United States*, 149 U. S. 698, 724.

4. (Rule 1.) RESIDENCE. — The term "residence" is often used in the sense of domicile, *e. g.*, in insolvency statutes, *Ayers v. Weeks*, 65 N. H. 248; *Cobb v. Rice*, 130 Mass. 231; in statutes relating to administration and distribution, *White v. Tennant*, 31 W. Va. 790; 8 S. E. 596; *Gable v. Mays* (Md.), 17 Atl. 565; *Algood v. Williams*, 92 Ala. 551; 8 So. 722; in testamentary matters, *In re Zerega's Will*, 20 N. Y. Supp. 417; *Matter of Stover*, 4 Redf. (N. Y.) 82; *Von Hoffmann v. Ward*, 4 Redf. (N. Y.) 244; *Harberger's Will*, 13 Phila. 368; as to eligibility for public office, *People v. Connell*, 28 Ill. App. 285; *People v. Platt*, 50 Hun, 454; 3 N. Y. Supp. 367; in attachment statutes, *Labe v. Brauss*, 12 Pa. Co. Ct. 255; 2 Pa. Dist. 157; in matters of jurisdiction, *De Meli v. De Meli*, 120 N. Y. 485; *Kennedy v. Ryall*, 67 N. Y. 379; *Penfield*

v. C., *O. &c. R. R.* 29 Fed. Rep. 494; *Keith v. Stetter*, 25 Kan. 100; *Church v. Crossman*, 49 Iowa, 444; *Bradley v. Fraser*, 54 Iowa, 289; *In re Afflick*, 3 McArthur, 95. See, also, *Shaw v. Shaw*, 98 Mass. 158; *State v. Aldrich*, 14 R. I. 171; *Boucicault v. Wood*, 2 Biss. 34; *Cadwallader v. Howell*, 3 Harr. (N. J.) 138; *Reed's Appeal*, 71 Pa. St. 378; *Stratton v. Brigham*, 2 Sneed, 420; *State v. Grizzard*, 89 N. C. 115; *State v. Deniston*, 46 Kan. 359; *Campbell v. White*, 22 Mich. 178; *Kellogg v. Supervisors*, 42 Wis. 476; *Johnston v. Oshkosh*, 65 Wis. 473; *Venable v. Paulding*, 19 Minn. 488; *Chariton Co. v. Moberly*, 59 Mo. 238; *Lower Oxford Contested Election*, 11 Phila. 641.

The term residence is, however, construed in various senses, in accordance with the intent of the statute. *Tyler v. Murray*, 57 Md. 418; *Shaeffer v. Gilbert*, 73 Md. 66; *Krone v. Cooper*, 43 Ark. 547; *Morgan v. Nunes*, 54 Miss. 308; *Weaver v. Norwood*, 59 Miss. 665; *Frost v. Brisbin*, 19 Wend. 11; *Ludlow v. Szold* (Iowa), 57 N. W. 676; *Mintzner's Estate*, 2 Pa. Dist. 584. It may signify merely a fixed abode for the time being, as distinguished on the one hand from domicile, and on the other hand from mere temporary sojourn, *Eaves Costume Co. v. Pratt*, 2 Misc. 420; 22 N. Y. Supp. 74; *Alston v. Newcomer*, 42 Miss. 186; *Krone v. Cooper*, 43 Ark. 547; *Exchange Bank v. Cooper*, 40 Mo. 169; *Lewis v. Castello*, 17 Mo. App. 593; or it may signify merely temporary sojourn, without regard to its duration, *Tucker v. Field*, 5 Redf. (N. Y.) 139.

In Louisiana, where the conditions of domicile are precisely defined, an allegation of residence will not be construed as an allegation of domicile. *Succession of Thomas*, 35 La. An. 19, 22.

5. (Rule 1.) **HABITANCY.** — The term "inhabitant" is often construed in the sense of domicile. *Matter of Stover*, 4 Redf. (N. Y.) 82; *Gorham v. Shepherd*, 6 Mackey (D. C.), 596; *Merrill's Heirs v. Morrissett*, 76 Ala. 433; *Borland v. Boston*, 132 Mass. 89, questioning *Briggs v. Rochester*, 16 Gray, 337; *Kellogg v. Supervisors*, 42 Wis. 97. *Contra*, *Quinby v. Duncan*, 4 Harr. (Del.) 383.

6. (Rule 1.) **CITIZENSHIP.** — The term "citizenship," in its ordinary sense of nationality, conveys a distinct idea from that of domicile. *Brown's Case*, 5 Ct. of Cl. 571; *State v. Adams*, 45 Iowa, 99. Yet it is often construed in the sense of domicile. *Morris v. Gilmer*, 129 U. S. 315; *Saginaw Gas-Light Co. v. City of Saginaw*, 28 Fed. Rep. 549; *Wiggins v. Bethune*, 29 Fed. Rep. 51; *Comitis v. Parkerson*, 56 Fed. Rep. 556; *Von Glahn v. Varrenne*, 1 Dillon C. C. 515; *Kemna v. Brockhaus*, 10 Biss. C. C. 128; *Lessee of Butler v. Farnsworth*, 4 Wash. C. C. 101; *Quinby v. Hyatt*, 4 Harr. (Del.) 383.

7. (Rule 2.) **NECESSITY OF DOMICIL.** — That a person cannot be without a domicile has been held in respect of

- (1) taxation, *Thordike v. City of Boston*, 1 Met. 242; *Borland v. Boston*, 132 Mass. 89; *Kellogg v. Supervisors*, 42 Wis. 476; *Church v. Rowell*, 49 Me. 367.
- (2) jurisdiction, *Ayers v. Weeks*, 65 N. H. 248; 18 Atl. 1108.
- (3) succession, *Gilman v. Gilman*, 52 Me. 165; *Merrill's Heirs v. Morrissett*, 76 Ala. 433; *Matter of Stover*, 4 Redf. (N. Y.) 82; *Tucker v. Field*, 5 Redf. (N. Y.) 139; *Dupuy v. Wurtz*, 53 N. Y. 566.
- (4) administration, *Hindman's Appeal*, 85 Pa. St. 466.
- (5) pauper settlement, *Abington v. North Bridgewater*, 23 Pick. 177.

- (6) loyal character, *Desmare v. United States*, 93 U. S. 605.
- (7) homestead exemption, *Shepherd v. Cassidy*, 20 Tex. 24.
- (8) attachment, *Morgan v. Nunes*, 54 Miss. 308. In *Hicks v. Skinner*, 72 N. C. 1, it was held that a person could abandon his domicile in North Carolina without having acquired another elsewhere; but in *Hannon v. Grizzard*, 89 N. C. 115, 120, the court said that one domicile was never lost till a new one was acquired, and that this rule was "based upon the necessity of having some place by whose laws in case of death the personal estate must be administered." In *Ludlow v. Szold* (Iowa), 57 N. W. 676, in which it was held that a person may abandon and lose one "residence" without acquiring another, the court seem to have misinterpreted the phrase "change of habitation," as used in *Botna Val. State Bank v. Silver City Bank* (Iowa), 54 N. W. 472.

8. (Rule 3.) SINGLENESSE OF DOMICIL. — A person can have but one domicile at a time. *Desmare v. United States*, 93 U. S. 605; *Shaw v. Shaw*, 98 Mass. 158; *Gilman v. Gilman*, 52 Me. 165; *Ayers v. Weeks*, 65 N. H. 248; *Tipton v. Tipton*, 87 Ky. 243; *Alter v. Waddell*, 20 La. An. 246; *Merrill's Heirs v. Morrisett*, 76 Ala. 433. *Contra*, *Wharton, Conf. of L. s. 73*. And see, as to political or commercial domicile, *Smith v. Croom*, 7 Fla. 81, 150; as to domicile for purposes of divorce, *Greene v. Greene*, 11 Pick. 410; as to belligerent domicile, *The Venus*, 8 Cranch, 253. See *American Notes, supra*, 3 (Rule 1).

9. (Rule 4.) RETENTION OF DOMICIL. — A domicile once acquired is retained until it is changed. *State v. Hallett*, 8 Ala. 159; *Abington v. North Bridgewater*, 23 Pick. 170; *Hallet v. Bassett*, 100 Mass. 167; *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424; *Wilkins v. Marshall*, 80 Ill. 74; *Sanderson v. Ralston*, 20 La. An. 312; *Gilman v. Gilman*, 52 Me. 165; *Lewis v. Castello*, 17 Mo. App. 593. A domicile once acquired is retained while a person is in transitu to a new place of permanent settlement. *Shaw v. Shaw*, 99 Mass. 158; *Littlefield v. Brooks*, 50 Me. 475; *Mills v. Alexander*, 21 Tex. 154. The act of a wife in changing her abode cannot change the domicile of her husband against his will, *Porterfield v. Augusta*, 67 Me. 556; though he pays her occasional visits, *Scholes v. Iron Works*, 44 Iowa, 190.

10. (Rule 5.) DOMICIL OF INDEPENDENT PERSONS. — See *Abington v. North Bridgewater*, 23 Pick. 170; *Littlefield v. Brooks*, 50 Me. 475; *In re Bye*, 2 Daly (N. Y.), 534; *Wharton, Conf. of L. s. 29*.

11. (Rule 6.) DOMICIL OF ORIGIN.

- (1) As to legitimate children, see *Price v. Price*, 156 Pa. St. 617; 27 Atl. 291; *Harkins v. Arnold*, 46 Ga. 656; *In re Bye*, 2 Daly (N. Y.), 534; *Jacobs, Law of Domicil*, s. 105.
- (2) As to illegitimate or posthumous children, see *Houlton v. Loubec*, 35 Me. 411; *Story, Conf. of L. s. 46*; *Wharton, Conf. of L. s. 37*.
- (3) As to foundlings, see *Wharton, Conf. of L. s. 39*.
- (4) As to legitimate child, see *Wharton, Conf. of L. s. 38*; *Jacobs, Law of Domicil*, s. 30.

12. (Rule 7.) DOMICIL OF CHOICE, HOW ACQUIRED. — See *American Notes, supra*, 1, and *City of Hartford v. Champion*, 58 Conn. 268; 20 Atl. 471;

Price v. Price, 156 Pa. St. 617; 27 Atl. 291; *Cooper v. Beers*, 143 Ill. 25; 33 N. E. 61; *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704; *Jennison v. Hapgood*, 10 Pick. 77; *De Meli v. De Meli*, 67 How. (N. Y.) Pr. 20; *White v. Tennant*, 31 W. Va. 790; 8 S. E. 596; *Jones v. Allsbrook* (N. C.), 20 S. E. 170; *Matter of Stover*, 4 Redf. (N. Y.) 82; *Ayers v. Weeks*, 65 N. H. 248; *Verret v. Bonvillain*, 33 La. An. 1304.

13. (Rule 8.) CHANGE OF DOMICIL.

- (1) As to retention of domicile of origin till a domicile of choice is acquired, see *Price v. Price*, 156 Pa. St. 617; 27 Atl. 291; *Reed's Appeal*, 71 Pa. St. 378; *Harvard College v. Gore*, 5 Pick. 369; *Hallet v. Bassett*, 100 Mass. 187; *Catlin v. Gladding*, 4 Mason, 308; *Firth v. Firth*, 50 N. J. Eq. 137; *Allgood v. Williams*, 92 Ala. 551; 8 So. 722; *Knowlton v. Knowlton* (Ill.), 39 N. E. 595; *Dupuy v. Wurtz*, 53 N. Y. 556; *De Meli v. De Meli*, 67 How. (N. Y.) Pr. 20; *Tucker v. Field*, 5 Redf. (N. Y.) 139; *Matter of Stover*, 4 Redf. (N. Y.) 82; *Gilman v. Gilman*, 52 Me. 165; *Hallowell v. Saco*, 5 Me. 396; *Kellar v. Baird*, 5 Heisk. (Tenn.) 39; *Ex parte Blumer*, 27 Tex. 734; *Heirs of Holliman v. Peebles*, 1 Tex. 673; *Quinby v. Hyatt*, 4 Harr. (Del.) 383; *Kellogg v. Supervisors*, 42 Wis. 297; *Morgan v. Nunes*, 54 Miss. 308; *State v. Dayton*, 77 Mo. 678; *Smith v. Croom*, 7 Fla. 81. The Civil Code of Louisiana provides (Art. 46) that "a voluntary absence of two years from the State, or the acquisition of "residence in any other State of this Union or elsewhere, shall forfeit a domicile within this State." *Hyman v. Schlenker*, 44 La. An. 108; 10 So. 623.
- (2) As to abandonment of domicile of choice,
 - (i) whereupon a new domicile of choice is acquired, see *Cooper v. Beers*, 143 Ill. 25; 33 N. E. 61; *Ayers v. Weeks*, 65 N. H. 248. The fact that a person flees from justice, with an intention never to return, does not destroy his domicile, in the absence of proof that he has gained a new one elsewhere. *Cobb v. Rice*, 130 Mass. 231. See *American Notes*, *infra*, 21 (Rule 14).
 - (ii) whereupon the domicile of origin is resumed. *Reed's Appeal*, 71 Pa. St. 378; *Bremme's Estate*, 13 Pa. Co. Ct. 177; 2 Pa. Dist. 455; *Mayo v. Equitable Life Assur. Soc.* (Miss.) 15 So. 791.

14. (Rule 9.) DOMICIL OF DEPENDENT PERSONS, MINORS, AND MARRIED WOMEN. — Minors are generally deemed incapable, *proprio motu*, of changing their domicile during minority. *Van Matre v. Sankey*, 148 Ill. 356, 36 N. E. 628; *Harkins v. Arnold*, 46 Ga. 656. *Wharton, Conf. of L.* s. 41, suggests that, if the child has been "emancipated," he may acquire a domicile of his own. See *Woodward v. Woodward*, 87 Tenn. 644, 11 S. W. 892. Compare *Gilbraith v. Bunce*, 65 Mo. 349. An infant ward who was "twenty years old and engaged to be married," and who was therefore said to be "of an age to exercise a choice" as to "where" he would go, was held to be capable of acquiring a residence or domicile for himself. *Roberts v. Walker*, 18 Ga. 5. See *Commonwealth v. Graham*, 157 Mass. 73.

The domicile of an adopted child follows that of the adopting parent. *Wood-*

ward v. Woodward, 87 Tenn. 644; 11 S. W. 892; *In re Johnson* (Iowa), 54 N. W. 69; *Ross v. Ross*, 129 Mass. 243; *Washburn v. White*, 140 Mass. 568; *Foley's Estate*, 11 Phila. 47.

15. (Rule 9, Sub-Rule 1.) DOMICIL OF MINORS.

- (1) The domicile of a legitimate or legitimated minor is the same as, and changes with, that of the father. *Allgood v. Williams*, 92 Ala. 551; 8 So. 722; *Kennedy v. Ryall*, 67 N. Y. 367; *Von Hoffman v. Ward*, 4 Redf. (N. Y.) 244; *Lacy v. Williams*, 27 Mo. 280; *McCallum v. White*, 23 Ind. 43; *Parsonsfeld v. Kennebunkport*, 4 Me. *47; *Dresser v. Edison Illuminating Co.* 49 Fed. Rep. 257; *Cannon's Estate*, 15 Pa. Co. Ct. 312; *Wolfe's Estate*, 13 Pa. Co. Ct. 179; *Mills' Guardian v. City of Hopkinsville* (Ky.), 11 S. W. 776; *Mears v. Sinclair*, 1 W. Va. 185; *Lamar v. Micou*, 112 U. S. 452. A father may, upon his death, change the domicile of his child by appointing a testamentary guardian in another State, who, after the father's death, and in accordance with his intention, removes the child to such State. *White v. Howard*, 52 Barb. 294. But the fact that a father intrusts the care and keeping of his minor child to a person in another place does not change the minor's domicile. *De Jarnett v. Harper*, 45 Mo. App. 415. See *Allgood v. Williams*, *supra*. Where children under fourteen years of age were abandoned by their father, and lived with and were supported by their grandmother, it was held, under the California statute, that the legal residence of the children was that of the grandmother, and that the father could not change it by surreptitiously removing them to another county. *In re Vance*, 92 Cal. 195; 28 Pac. 229.
- (2) As to the domicile of an illegitimate minor, see *Blackstone v. Seekonk*, 8 Cushing, 75; *Houlton v. Lubec*, 35 Me. 411; *Wharton, Conf. of L.* s. 37; *Jacobs, Law of Domicil*, ss. 105, 195. The domicile of a minor whose father is dead is the same as, and changes with, the domicile of the mother, so long as she remains a widow. *Lamar v. Micou*, 112 U. S. 452; *Mears v. Sinclair*, 1 W. Va. 185; *Kennedy v. Ryall*, 67 N. Y. 367; *Lacy v. Williams*, 27 Mo. 280; *Freetown v. Taunton*, 16 Mass. 51. It is not changed by her marrying again and acquiring the domicile of a second husband. *Lamar v. Micou*, 112 U. S. 452; *Mears v. Sinclair*, 1 W. Va. 185; *Freetown v. Taunton*, 16 Mass. 52; *Johnson v. Copeland*, 35 Ala. 521; *School Directors v. James*, 2 Watts & S. 568; *Brown v. Lynch*, 2 Bradf. (N. Y.) 214; *Ex parte Dawson*, 3 Bradf. (N. Y.) 130; *Allen v. Thomason*, 11 Humph. (Tenn.) 536.
- (3) There is much conflict in the American decisions as to the power of a guardian to change the domicile of his ward. *Wharton, Conf. of L.* s. 42, says that a guardian cannot change his ward's domicile except by leave of court. The law on the subject has been stated by the Supreme Court of the United States thus: "A testamentary guardian nominated by the father may have the same control of the ward's domicile that the father had. *Wood v. Wood*, 5 Paige, 596. And any guardian, appointed in the State of the domicile of the ward, has been generally held to have the power of changing the ward's domicile from one county to another within the

"same State and under the same law. *Cutts v. Haskins*, 9 Mass. 543; *Holyoke v. Haskins*, 5 Pick. 20; *Kirkland v. Whately*, 4 Allen, 462; *Anderson v. Anderson*, 42 Vt. 350; *Ex parte Bartlett*, 4 Bradford, 221; *The Queen v. Whitley*, L. R. 5 Q. B. 325, 331. "But it is very doubtful, to say the least, whether even a guardian appointed in the State of the domicile of the ward (not being the natural guardian or a testamentary guardian) can remove the ward's domicile beyond the limits of the State in which the guardian is appointed and to which his legal authority is confined. *Douglas v. Douglas*, L. R. 12 Eq. 617, 625; *Daniel v. Hill*, 52 Ala. 430; *Story, Conf. of L. s.* 506, note; *Dacey on Domicil*, 100, 132. And it is quite clear that a guardian appointed in a State in which the ward is temporarily residing cannot change the ward's permanent domicile from one State to another." *Lamar v. Micou*, 112 U. S. 452, 471, 472. See *Jacobs, Law of Domicil*, ss. 256-263. It has been held that a child under ten years of age, who, with the assent of its appointive guardian, resides, after the death of its parents, with its paternal grandmother in another State, such grandmother being its next of kin and the head of the family, acquires the domicile of the grandmother, who is, under the circumstances, to be considered as its guardian by nature. *Lamar v. Micou*, 114 U. S. 218; 5 Sup. Ct. 857. This decision has been cited as authority in *Re Benton* (Iowa), 60 N. W. 614; but the Supreme Court of Tennessee has said that the Supreme Court of the United States went "further than we would feel at liberty to go, and we cite it (the case) merely as instructive." *Woodward v. Woodward*, 87 Tenn. 644. See, generally, *School Directors v. James*, 2 Watts & S. 568; *Mintzner's Estate*, 2 Pa. Dist. 584; *Trammell v. Trammell*, 20 Tex. 406; *Wheeler v. Hollis*, 19 Tex. 522; *City of Louisville v. Sherley*, 80 Ky. 71; *In re Afflick's Estate*, 3 McArthur, 95; *Townsend v. Kendall*, 4 Minn. 412; *Mears v. Sinclair*, 1 W. Va. 185; *Colburn v. Holland*, 14 Rich. Ch. (So. Car.) 176, 229. It is clear that a guardian will not be permitted to change the domicile of his ward for a fraudulent purpose; and the courts, in determining the question of an alleged or attempted change of domicile, frequently consider whether such change was, or would be, beneficial or injurious to the interests of the ward.

16. (Rule 9, Sub-Rule 2.) DOMICIL OF MARRIED WOMAN. — The domicile of a married woman is the same as, and changes with, that of her husband. *Anderson v. Watt*, 136 U. S. 694; *Cooper v. Beers*, 143 Ill. 25; *Babbitt v. Babbitt*, 69 Ill. 277; *Bate v. Incisa*, 59 Miss. 513; *Suter v. Suter* (Miss.), 16 So. 678; *Wingfield v. Rhea*, 77 Ga. 84; *Remey v. Board of Equalization*, 80 Iowa, 470, 45 N. W. 899; *Colburn v. Holland*, 14 Rich. Ch. (So. Car.) 176, 229; *Mason v. Homer*, 105 Mass. 116; *Parrett v. Palmer* (Ind. App.), 35 N. E. 713; *Hackettston Bank v. Mitchell*, 4 Dutch. 516; *Williams v. Saunders*, 5 Cold. 60; *McPherson v. Housel*, 2 Beasley, 35; *Sanderson v. Ralston*, 20 La. An. 312; *Christie's Succession*, 20 La. An. 383; *McAfee v. Kentucky University*, 7 Bush, 135; *Smith v. Morehead*, 6 Jones Eq. (N. C.) 360; *Angier v. Angier*, 7 Phila. 305; *Dow v. Gould*, 31 Cal. 629; *Austin's Estate*, Myrick's Probate (Cal.), 237; *Bank v. Balcom*, 35 Conn. 351; *Hunt v. Hunt*, 72 N. Y. 217; *Ditson v. Ditson*, 4 R. I. 87; *Greene v. Windham*, 13 Me. 225; *Hollister v. Hollister*, 6 Pa. St.

449; *Hanberry v. Hanberry*, 29 Ala. 719; *Jenness v. Jenness*, 24 Ind. 355; *Lacey v. Clements*, 36 Tex. 661. A husband and wife lived apart for twelve years by mutual consent, the wife living in New York and the husband in Pennsylvania, where they at first resided after their marriage. During the subsequent period of separation, their children lived with the wife in New York, and were wholly supported by her. After her death, the husband claimed a right to share in her estate, a right to which he was entitled by the laws of Pennsylvania, but not by those of New York. It was held that the domicile of the wife was in New York, and that the husband's claim must be determined by the laws of that State. The court said: "The whole claim of the plaintiff is based upon the old rule that a woman by marriage acquires the domicile of her husband and changes it with him. . . . The old rule in reference to a married woman's domicile cannot, certainly, prevail in view of the rights which are recognized to be hers by statute. . . . The wife is now a distinct legal entity, having in the disposition of her property all the rights, and even more than a husband has ever possessed, and the husband has no control whatever over her movements or her disposition of her property." *Matter of Florance*, 54 Hun (N. Y.), 328. An appeal from this decision was dismissed on technical grounds, 119 N. Y. 661. After judicial separation from her husband, a wife may choose a domicile for herself. *Barber v. Barber*, 21 How. 582; *Hunt v. Hunt*, 72 N. Y. 217. A wife may gain an independent domicile after being abandoned by her husband. *Greene v. Windham*, 13 Me. 225. As to the question whether a wife is obliged to follow her husband to a distant place of settlement, see *Bishop v. Bishop*, 30 Pa. St. 412; *Cutler v. Cutler*, 2 Brewst. 511; *Boyce v. Boyce*, 23 N. J. Eq. 337.

While a wife cannot create a claim to an independent domicile by abandoning without cause the domicile of her husband and making her residence elsewhere (*Suter v. Suter* (Miss.), 16 So. 678; *Babbitt v. Babbitt*, 69 Ill. 277), she may acquire a separate domicile for the purpose of divorce proceedings. *Harteau v. Harteau*, 14 Pick. 181; *Dutcher v. Dutcher*, 39 Wis. 651; *Hunt v. Hunt*, 72 N. Y. 217; *Mellen v. Mellen*, 10 Abb. (N. Y.) N. C. 329 and note, pp. 333-342, reviewing the decisions on the subject; *Chapman v. Chapman*, 129 Ill. 386; 21 N. E. 806; *Hollister v. Hollister*, 6 Pa. St. 449; *Colvin v. Reed*, 55 Pa. St. 375; *Hanberry v. Hanberry*, 29 Ala. 719; *Ditson v. Ditson*, 4 R. I. 87.

17. (Rule 10.) INCAPACITY OF DEPENDENT PERSON TO ACQUIRE A DOMICIL. — As to the inability of an infant to acquire a domicile through his own act, see *Von Hoffman v. Ward*, 4 Redf. (N. Y.) 244; *Harkins v. Arnold*, 46 Ga. 656. See, *supra*, 14 (Rule 9). As to married women, see notes, *supra*, 16 (Rule 9, Sub-Rule 2).

18. (Rule 11.) DEPENDENT PERSON, ON BECOMING INDEPENDENT, RETAINS LAST DEPENDENT DOMICIL TILL HE CHANGES IT.

(1) As to minor who has attained his majority, see *Johnston v. Turner*, 29 Ark. 280; *Von Hoffman v. Ward*, 4 Redf. (N. Y.) 244; *Worcester v. Springfield*, 127 Mass. 540.

(2) As to widow, see *Pennsylvania v. Ravenel*, 21 How. 103; *Barber v. Barber*, 21 How. 582; *Williams v. Saunders*, 6 Cold. 60; *Johnston v. Turner*, *supra*; *Dupuy v. Wurtz*, 53 N. Y. 556.

19. (Rule 12.) DOMICIL ALWAYS ASCERTAINABLE. — That domicile is always ascertainable, see *Abington v. North Bridgewater*, 23 Pick. 170; *Thorn-*

dike v. City of Boston, 1 Met. 242; *State v. Palmer*, 65 N. H. 9; 17 Atl. 977. In a case where the facts seemed consistent with either residence or non-residence, and there were circumstances strongly indicative of fraud, the court so determined the question of residence as would best secure the rights of creditors. *Keith v. Stetter*, 25 Kan. 100. In this relation, see the Civil Code of Louisiana (Art. 38), which provides that where a person resides alternately in several places, etc., any one of such places may be considered as his principal establishment, "at the option of the persons whose interests are thereby affected."

20. (Rule 13.) **PRESENCE PRESUMPTIVE EVIDENCE OF DOMICIL.** — That a person's presence is presumptive evidence of domicile, see cases, *supra*, 19 (Rule 12); also, *King v. United States*, 27 Ct. of Cl. 529; *Guier v. O'Daniel*, 1 Binney, 349 note; *Olsen's Will*, 63 Iowa, 145.

21. (Rule 14.) **DOMICIL ONCE ACQUIRED PRESUMED TO BE RETAINED.** — That a domicile once acquired is presumed to continue, see *Desmare v. United States*, 93 U. S. 605; *Mitchell v. United States*, 21 Wall. 350; *Price v. Price*, 156 Pa. St. 617; 27 Atl. 291; *Fisk v. Railroad*, 53 Barb. 472; *Ferguson v. Wright*, 113 N. C. 537; 18 S. E. 691; *Fulham v. Howe* (Vt.), 20 Atl. 101; *Woods v. Inhabitants of Bristol*, 84 Me. 358; 24 Atl. 865; *Church v. Crossman*, 49 Iowa, 444; *Keith v. Stetter*, 25 Kan. 100. The burden of proof is on him who asserts that domicile has been changed. *Price v. Price*, 156 Pa. St. 617; 27 Atl. 291; *Hyman v. Schlenker*, 44 La. An. 108; *Tucker v. Field*, 5 Redf. (N. Y.) 139. But the presumption that a domicile once acquired continues will not prevail when its effect would be to impose upon a person the character of an enemy to his government. *Stoughton v. Hill*, 3 Woods C. C. 404.

22. (Rule 15.) **FACTS PROVING RESIDENCE OR AN INTENTION TO RESIDE PERMANENTLY.** — The question of domicile "depends, not upon proving particular facts, but whether all the facts and circumstances taken together, tending to show that a man has his home or domicile in one place, overbalance all the like proofs tending to establish it in another." *Shaw, C. J., Abington v. North Bridgewater*, 23 Pick. 170, 178, cited in *Hindman's Appeal*, 85 Pa. St. 466, 470. But, as the taking together of "all the facts and circumstances" presupposes the proof of particular facts and circumstances, any fact or circumstance which is evidence of the existence at a particular place of the constituents of domicile is evidence of the existence of a domicile there. *Wright v. Boston*, 126 Mass. 161; *Moor v. Harvey*, 128 Mass. 219; *Williams v. Roxbury*, 12 Gray, 734; *Fisk v. Chester*, 8 Gray, 506; *In re Gould's Will*, 9 N. Y. Supp. 603; *In re Zerega's Will*, 20 N. Y. Supp. 417; *Merrill's Heirs v. Morrisett*, 76 Ala. 433; *Verret v. Bonvillain*, 33 La. An. 1304; *Hyman v. Schlenker*, 44 La. An. 108; *The Thomas*, 24 Fed. Rep. 375; *Behrensmeier v. Kreitz*, 135 Ill. 591; 26 N. E. 704; *Keith v. Stetter*, 25 Kan. 100; *City of Hartford v. Champion*, 58 Conn. 268; 20 Atl. 471; *Cerro Gordo County v. Hancock County*, 58 Iowa, 114; *Swaney v. Hutchins*, 13 Neb. 266; *Berry v. Hull* (N. M.), 30 Pac. 936. The fact that a person has for a long time ceased to perform the duties and avail himself of the privileges of a citizen in a particular place is evidence that he has abandoned his domicile there. *Moor v. Harvey*, 128 Mass. 219; *Meserve v. Folsom*, 62 Vt. 504; 20 Atl. 926. The fact that a person engages in business and votes in a particular place is evidence that he is domiciled there. *Austin's Estate*,

Myrick's Probate (Cal.), 237. The fact of voting is accepted as evidence, though it is not conclusive evidence, of domicile. *Hayes v. Hayes*, 74 Ill. 312; *East Livermore v. Farmington*, 74 Me. 154; *Fisk v. Railroad*, 53 Barb. 472; *Mandeville v. Huston*, 15 La. An. 281. Payment of taxes is evidence of domicile. *Chase v. Chase* (N. H.), 29 Atl. 553; *Hood v. Judkins*, 61 Mich. 575; 28 N. W. 689; *Meserve v. Folsom*, 62 Vt. 504; 20 Atl. 926; *Bowman v. Boyd* (Nev.), 30 Pac. 823. So is the execution of one's will in accordance with the laws of a particular place. *Dupuy v. Wurtz*, 53 N. Y. 556; *Dupuy v. Seymour*, 64 Barb. 156; *Tucker v. Field*, 5 Redf. (N. Y.) 139. The "ownership of real estate" in a place, "not coupled with residence therein, is of no value with reference to domicile or residence." *Price v. Price*, 156 Pa. St. 617; 27 Atl. 291; *Dupuy v. Wurtz*, *supra*; *Barton v. Irasburgh*, 33 Vt. 159; *Heirs v. Peebles*, 1 Tex. 673; *Butler v. Hoffer*, 1 Wash. C. C. 499. As to the ownership of real estate, coupled with other circumstances, especially as affecting the question of the retention of domicile, see *Jacobs, Law of Domicil*, ss. 417-419. A mere declaration of intention to become a citizen of the United States is insufficient to prove an intention to adopt as a domicile the place, city, or State in which such declaration is made. *Bremme's Estate*, 13 Pa. Co. Ct. 177; 2 Pa. Dist. 455. That a person attended a particular church is admissible as tending to show his domicile. *Fulham v. Howe*, 62 Vt. 386; 20 Atl. 101. The residence of the wife is *prima facie* evidence of the husband's domicile. *Brewer v. Linnaeus*, 36 Me. 428.

23. (Rule 16.) DECLARATIONS. — As evidence of domicile, acts are more important than words. *Firth v. Firth*, 50 N. J. Eq. 137. Nevertheless, a person's declarations are admissible to show the character of his residence. *Kemna v. Brockhaus*, 10 Biss. C. C. 128; *Kilburn v. Bennett*, 3 Met. 199; *Hulett v. Hulett*, 37 Vt. 581; *Verret v. Bonvillain*, 33 La. An. 1304; *Ex parte Blumer*, 27 Tex. 734; *Gundlin v. Hamburg-American Packet Co.* 6 Misc. 620; 26 N. Y. Supp. 73. The operation of this rule is qualified in many jurisdictions by the common-law rule excluding declarations of a party in his own behalf on the ground of interest, unless they accompany the act in question and serve to explain it as part of the *res gestæ*; and this qualification has given rise, sometimes even in the same jurisdiction, to much conflict of authority. *Viles v. Waltham*, 157 Mass. 542; *Brookfield v. Warren*, 128 Mass. 287; *Wright v. Boston*, 126 Mass. 161; *Chase v. Chase* (N. H.), 29 Atl. 553; *Ayers v. Weeks*, 65 N. H. 248; 18 Atl. 1108; *State v. Palmer*, 65 N. H. 9; 17 Atl. 977; *Fulham v. Howe*, 62 Vt. 386; *Bangor v. Brewer*, 47 Me. 97; *Burgess v. Clark*, 3 Ind. 250; *Griffin v. Wall*, 32 Ala. 149; *Mitchell v. United States*, 21 Wall. 350; *Beason v. State*, 34 Miss. 602; 1 *Wharton on Ev.* s. 258 *et seq.* As to declarations or statements in wills, see *Dupuy v. Wurtz*, 53 N. Y. 556; *Dupuy v. Seymour*, 64 Barb. 156; *Mackenzie v. Mackenzie*, 3 Misc. 200, 23 N. Y. Supp. 270; *Matter of Stover*, 4 Redf. (N. Y.) 82; *Gable v. Ways* (Md.), 17 Atl. 565; *Harberger's Will*, 13 Phila. 368. By the Civil Code of Louisiana (Art. 42) the intention of a person to make his principal establishment in another parish than that in which he is domiciled, and thus to change his domicile to such other parish, is proved by a written declaration of his intention before the recorders of the parishes from which and to which he shall intend to remove; but, in case this declaration is not made, his intention must be inferred from circumstances (Art. 43).

24. (Rule 17.) RESIDENCE AS EVIDENCE OF DOMICIL. — That residence in a place is evidence of domicile there, see *Anderson v. Watt*, 138 U. S. 694;

Ennis v. Smith, 14 How. 400; *Shelton v. Tiffin*, 6 How. 163; *The Venus*, 8 Cranch, 253; *Abington v. North Bridgewater*, 23 Pick. 170; *Hart v. Lindsey*, 17 N. H. 235; *Ryall v. Kennedy*, 40 N. Y. Super. Ct. 347; *Hindman's Appeal*, 85 Pa. St. 466; *Carey's Appeal*, 75 Pa. St. 201; *State v. Frest*, 4 Harr. (Del.) 558; *Quinby v. Duncan*, 4 Harr. (Del.) 383; *Johnston v. Turner*, 29 Ark. 280; *Ex parte Blumer*, 27 Tex. 734; *Mills v. Alexander*, 21 Tex. 154; *In re Toner*, 39 Ala. 454; *Horne v. Horne*, 9 Ired. 99; *Graveley v. Graveley*, 25 So. Car. 1; *Olsen's Will*, 63 Iowa, 145; *Keith v. Stetter*, 25 Kan. 100; *Dow v. Gould*, 31 Cal. 629; *Hairston v. Hairston*, 27 Miss. 704; *Alter v. Waddill*, 20 La. An. 246; *Cadwallader v. Howell*, 3 Harr. (N. J.) 138. But no particular length of residence is required to gain a domicil. *Guier v. O'Danel*, 1 Binney, 349 note; *Carey's Appeal*, 75 Pa. St. 201; *The Venus*, 8 Cranch, 253; *Cooper v. Galbraith*, 3 Wash. C. C. 546; *Johnson v. Twenty-one Bales*, 2 Paine, 601; *Kenna v. Brockhaus*, 10 Biss. C. C. 128; *Stockton v. Staples*, 66 Me. 197; *Parsons v. Bangor*, 61 Me. 457; *Swaney v. Hutchins*, 13 Neb. 266; *Russell v. Randolph*, 11 Tex. 460; *Horne v. Horne*, 9 Ired. 99; *Verret v. Bonvillain*, 33 La. An. 1304; *Johnston v. Turner*, 29 Ark. 280; *Hart v. Horn*, 4 Kan. 232; *Hairston v. Hairston*, 27 Miss. 704; *Hulett v. Hulett*, 37 Vt. 581. Yet length of residence, unexplained, may be evidence of the *animus manendi*. *Dupuy v. Wurtz*, 53 N. Y. 556; *Williamson v. Parisien*, 1 Johns. Ch. 389; *Ennis v. Smith*, 14 How. 400; *The Ann Green*, 1 Gall. 274; *White v. Brown*, 1 Wall. Jr. 217; *Hood's Estate*, 21 Pa. St. 106; *Hulett v. Hulett*, 37 Vt. 581.

25. (Rule 18.) RESIDENCE, OR NON-RESIDENCE, NOT NECESSARILY EVIDENCE OF THE EXISTENCE OR NON-EXISTENCE OF DOMICIL IN A PARTICULAR PLACE. — As has been seen (*supra*, 1, Rule 1), it is essential to domicil that there should be an intention to remain permanently, or at least indefinitely, in the place where one resides. As to how far the fact of residence or non-residence is or is not evidence of domicil, see generally the cases cited *supra*, under 24 (Rule 17). See, also, *Fain v. Crawford*, 91 Ga. 30; 16 S. E. 106.

With respect to residence as affecting domicil, the controlling question is that of intent, not motive. Thus, if a person gives up his residence in one State and removes to another State with the intention of making the latter his permanent home, he acquires a domicil in the latter, though his motive was to prevent the defendant (a corporation) from removing a suit, which he intended to bring against it, to the United States Courts. *Chicago & Northwestern R'y Co. v. Ohle*, 117 U. S. 123. See, also, *Young v. Pollak*, 85 Ala. 439; 5 So. 279.

Among persons in respect of whom the question of residence requires exceptional or somewhat special consideration, we may note the following classes: —

- (1) *Prisoners*. — The transportation of a person to a place other than that of his residence, for the purpose of temporary imprisonment, does not change his domicil. *Baltimore v. Chester*, 53 Vt. 315, and cases therein cited; *Barton v. Barton*, 74 Ga. 761; *Hardy v. De Leon*, 5 Tex. 211; *Young v. Pollak*, 85 Ala. 439; 5 So. 279.
- (2) *Convicts*. — A person confined as a convict, for a term of years, does not acquire a domicil in the place of his confinement. *Topsham v. Lewiston*, 74 Me. 237, criticising *Reading v. Westport*, 19 Conn. 561, and *Washington v. Kent*, 38 Conn. 249, and citing with approval *Grant v. Dalliber*, 11 Conn. 234, 238; *Barton v. Barton*, 74 Ga. 761.

- (3) *Fugitives and Refugees*. — The fact that a person leaves a place as a fugitive from justice, intending never to return, does not destroy his domicile there. *Cobb v. Rice*, 130 Mass. 231, cited with approval in *Ayers v. Weeks*, 65 N. H. 248. But if a person in such a predicament goes to a new place with the intention to remain permanently or indefinitely, he acquires a domicile there. *Young v. Pollak*, 85 Ala. 439; 5 So. 279; *Cobb v. Rice*, 130 Mass. 231. The Constitution of New York provides that no person shall be deemed to have gained or lost a residence by reason of his presence or absence at any almshouse or other asylum at public expense, nor while confined in any public prison. *People v. Cady*, 143 N. Y. 100; 20 N. Y. Supp. 474; 37 N. E. 673.
- (4) *Paupers*. — As to pauper settlement or domicile, see *People v. Cady*, 143 N. Y. 100; 20 N. Y. Supp. 474; 37 N. E. 673; *Baltimore v. Chester*, 53 Vt. 315; *Freeport v. Board of Supervisors*, 41 Ill. 495; *Covode v. Foster*, 4 Brewst. 414; *Amherst v. Hollis*, 9 N. H. 107; *Washington v. Kent*, 38 Conn. 249; *Topsham v. Lewiston*, 74 Conn. 236. An inmate of a veteran's home, who intends to remain as long as he lives, though he took up his abode there because of indigence, acquires a residence for voting purposes. *Stewart v. Keyser* (Cal.), 39 Pac. 19.
- (5) *Lunatics*. — As to the domicile of insane persons the decisions are conflicting. It has been held that a domicile acquired by a person when sane cannot, after he has become insane, be changed by his guardian. *Pittsfield v. Detroit*, 53 Me. 442. *Contra*, *Holyoke v. Haskins*, 5 Pick. 20; *Anderson v. Anderson*, 42 Vt. 350; *Hill v. Horton*, 4 Den. (N. Y.) 88. A person under guardianship as an insane, or as a weak-minded, person may, however, have sufficient mental capacity to acquire a domicile for himself and thus to change his domicile. *Talbot v. Chamberlain*, 149 Mass. 57; 20 N. E. 305; *Mowry v. Latham*, 17 R. I. 480; *Culver's Appeal*, 48 Conn. 165. And insanity does not prevent continuous residence from establishing a pauper settlement where the residence began before the insanity. *Topsham v. Lewiston*, 74 Me. 236, and cases therein cited.
- (6) *Invalids*. — A change of residence for purposes of health does not generally effect a change of domicile. *Fidelity Trust &c. Co. v. Preston*, 16 Ky. L. Rep. 461; 28 S. W. 658; *Still v. Woodville*, 38 Miss. 646; *Ex parte Blumer*, 27 Tex. 734; *Dupuy v. Wurtz*, 53 N. Y. 556; *Hegeman v. Fox*, 31 Barb. 475; *Isham v. Gibbons*, 1 Bradf. 69; *Kellogg v. City of Oshkosh*, 14 Wis. 625.
- (7) *Officials*. — A person does not lose his domicile by absence in the service of the government. *In re Town of Highlands*, 22 N. Y. Supp. 137; *State v. Grizzard*, 89 N. C. 115; *Dennis v. State*, 17 Fla. 389; *Commonwealth v. Jones*, 12 Pa. St. 365, 371. Yet he may, just as other persons, change his domicile. *Moor v. Harvey*, 128 Mass. 219; *Commonwealth v. Kelleher*, 115 Mass. 103; *Darragh v. Bird*, 3 Oregon, 229; *Wood v. Fitzgerald*, 3 Oregon, 568. The Maryland statute (Act of 1890, ch. 573, s. 14), which requires all persons leaving the State to reside abroad to make a certain declaration in order to retain their domicile, applies to officials in the service of the United States. *Sterling v. Horner*, 74 Md. 573; *Lancaster v. Herbert*, 74 Md. 334; *Southerland v. Norris*, 74 Md. 326.

- (8) *Ambassadors*. — That domicile is not changed by residence abroad as a diplomatic representative, see observation of the court in *Crawford v. Wilson*, 4 Barb. 504 ; and of Gibson, C. J., in *Commonwealth v. Jones*, 12 Pa. St. 365, 371. *Wharton, Conf. of L.* s. 49, places this rule on the ground that the "house of an ambassador, or minister "extraordinary, is regarded as a part of the territory which he "represents." Though this fiction, which is carefully to be distinguished from the personal extra-territoriality of the minister, has gained currency in consequence of the fondness of writers for metaphorical expressions, it has little foundation in law. See article on Asylum in Legations, etc., *Political Science Quarterly*, vol. vii., pp. 397-405. But it is clear that the foreign residence of a diplomatic agent in itself affords no evidence of an intention permanently to reside abroad.
- (9) *Consuls*. — As in the case of diplomatic agents, the residence of a person abroad in a consular capacity in itself affords no evidence of a change of domicile. *Wooldridge v. Wilkins*, 4 How. (Miss.) 360, 366.
- (10) *Persons in the Military or Naval Service*. — While mere enlistment and service abroad by such persons do not show a change of domicile (*Brewer v. Linnaeus*, 36 Me. 428 ; *Knowlton v. Knowlton*, 39 N. E. 595), yet such persons may change their domicile in the ordinary way. *Moor v. Harvey*, 128 Mass. 219 ; *Remey v. Board of Equalization*, 80 Iowa, 470 ; 45 N. W. 899 ; *Ames v. Duryea*, 6 Lansing, 155.
- (11) *Sailors*. — Though sailors may in the ordinary way change their domicile, mere absence on duty, however prolonged, has no such effect. *Guier v. O'Daniel*, 1 Binney, 349 note ; *Thorndike v. City of Boston*, 1 Met. 242, 246 ; *Hallet v. Bassett*, 100 Mass. 167 ; *Stockton v. Staples*, 66 Me. 197 ; *In re Bye*, 2 Daly (N. Y.), 525. Nor can a sailor's wife change his domicile in his absence, and against his will, by removing his effects and children to another place. *Porterfield v. Augusta*, 67 Me. 556.
- (12) *Servants*. — The domicile of the servant is that of the master. *Moreland v. Davidson*, 71 Pa. St. 371. But not necessarily so. *Cerro Gordo County v. Hancock County*, 58 Iowa, 114. See *Wharton, Conf. of L.* s. 47.
- (13) *Apprentices*. — The domicile of the apprentice is that of the master. *Maddox v. The State*, 32 Ind. 14.
- (14) *Ecclesiastics*. — In the United States the domicile of a clergyman is not necessarily within his charge or diocese. The domicile of an itinerant clergyman is the place of his last permanent residence. *Allgood v. Williams*, 92 Ala. 551 ; 8 So. 722.
- (15) *Students*. — A person does not gain a domicile by residing in a place merely as a student. *Opinion of the Judges*, 5 Met. 587 ; *Granby v. Amherst*, 7 Mass. 1 ; *Fry's Election Case*, 71 Pa. St. 302 ; *Lower Oxford Contested Election*, 11 Phila. 641 ; *Sanders v. Getchell*, 76 Me. 158 ; *Hart v. Lindsey*, 17 N. H. 235 ; *Kelley v. Garrett*, 67 Ala. 304 ; *Matter of Rice*, 7 Daly, 22 ; *White v. Howard*, 52 Barb. 294 ; *Vanderpoel v. O'Hanlon*, 53 Iowa, 246 ; 36 Am. Rep. 216. If, however, there is a permanent abode, which may be shown by engaging

in business, by establishing a home, or by other circumstances, a domicile is acquired. *Matter of Ward*, 19 Abbott (New Cas.), 187; 20 N. Y. Supp. 606; *Dale v. Irwin*, 78 Ill. 170; *Sanders v. Getchell*, *supra*; *Putnam v. Johnson*, 10 Mass. 488; *Lower Oxford Contested Election*, *supra*.

26. (Rule 19.) DOMICIL OF CORPORATIONS. — The domicile of a corporation is entirely distinct from the personal domicile of its shareholders or officers; so that, if its property, its sole place of business, and its general office be in one place, its domicile is there also, though its trustees and shareholders reside, and the trustees often hold meetings, in different places. *Perry v. Round Lake Camp-meeting Association*, 22 Hun, 293. A corporation created under the laws of a particular State has its domicile in that State, and cannot change it by doing business in another State. *Bank of Augusta v. Earle*, 13 Pet. 520; *Balto. & Ohio R. R. Co. v. Koontz*, 14 Otto, 5; *Douglass v. P. Ins. Co.* 138 N. Y. 209; 33 N. E. 938; *Boston Investment Co. v. Boston*, 158 Mass. 461. See *Pelton v. Northern Transportation Co.* 37 Ohio St. 450; *Baltimore v. Pass. Ry. Co.* 57 Md. 31. A company, when chartered in several States successively, becomes a citizen of each of such States. *Memphis &c. R. R. v. Alabama*, 107 U. S. 581; *Railroad v. Barnhill*, 91 Tenn. 395, and cases cited. And a foreign corporation, when it obtains the privilege of doing business, and establishes a permanent general agency, in a State, is, as to the business there transacted, to be considered as domiciled there, so as to be subject to the same obligations and liabilities as a domestic corporation. *Martine v. Int. Life Ins. Co.* 53 N. Y. 339; *N. Y. Life Ins. Co. v. Best*, 23 Ohio St. 105. In the first of the two cases last cited (*Martine v. Int. Life Ins. Co.*), the defendant, which was an English corporation, was held, under the circumstances, to have possessed, as to the business which the New York agency transacted, a belligerent domicile, so that it could not plead the non-payment of premiums during the Civil War by a Confederate policy-holder.

27. TAXATION. — Tangible movables are generally taxable at the place where they are actually situated. *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18; *Coe v. Errol*, 116 U. S. 517; *Brown v. Houston*, 114 U. S. 622; *Lumber Co. v. Loraine*, 22 Fed. Rep. 54; *State v. Dalrymple*, 70 Md. 294; 17 Atl. 82; *Pullman's Palace Car Co. v. Twombly*, 29 Fed. Rep. 658; *Burlington Lumber Co. v. Willits*, 118 Ill. 559; *People v. Smith*, 88 N. Y. 576; *Taylor v. Love*, 43 N. J. L. 142; *Maurer v. Cliff*, 94 Mich. 194; 53 N. W. 1055; *Colbert v. Leake County Supervisors*, 60 Miss. 142; *State v. Howard County Court*, 69 Mo. 454; *Standard Oil Co. v. Combs*, 96 Ind. 179; 49 Am. Rep. 156; *Pullman's Palace Car Co. v. Board of Assessors*, 55 Fed. Rep. 206; *National Dredging Co. v. State* (Ala.), 12 So. 720. See *Com. v. Gaines*, 80 Ky. 489; *Hardesty v. Fleming*, 57 Tex. 395; *Vogt v. Ayer*, 104 Ill. 583; *Hood v. Judkins*, 61 Mich. 575; 28 N. W. 689. See, as to property tangible and intangible, held by trustee, *Anthony v. Caswell*, 15 R. I. 159; 1 Atl. 290; *People v. Coleman*, 119 N. Y. 137; 23 N. E. 488; *In re Lines' Estate*, 155 Pa. St. 378; 26 Atl. 728; 32 W. N. C. 376; *Appeal Tax Court v. Gill*, 50 Md. 377; *Trustees v. City Council* (Ga.), 17 S. E. 61; by guardian, *Louisville v. Sherley*, 80 Ky. 71. Property merely in transit is not subject to taxation. *Coe v. Errol*, 62 N. H. 303; *Robinson v. Longley*, 18 Nev. 71.

Personalty cannot be taxed at a place where it has neither an actual nor a

legal situs. *Commonwealth v. Cameron*, 19 Mo. App. 573; *People v. New York Tax Comrs.* 38 Hun, 536; *Dallinger v. Rapallo*, 14 Fed. Rep. 32. But, in many of the States, the maxim *mobilia personam sequuntur* has been applied to taxation, and all personal property has been held to be taxable at the domicile of the owner as its legal situs. *Bemis v. Boston*, 96 Mass. 366; *People v. Eastman*, 25 Cal. 603; *Heinman v. Stover*, 43 Me. 497; *Murray v. Charleston*, 96 U. S. 432; *Appeal Tax Court v. Patterson*, 50 Md. 354; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Klein v. French*, 57 Miss. 668; *Augusta v. Dunbar*, 50 Ga. 587; *People v. Chenango*, 11 N. Y. 563; *Nugent v. Bates*, 51 Iowa, 77; *Pellon v. Northern Transportation Co.* 37 Ohio St. 450; *Standard Oil Co. v. Bachelor*, 89 Ind. 1; *Barnes v. Woodbury*, 17 Nev. 383; 30 Pac. 1068. Some of the States, however, in order to avoid double taxation, have by statute exempted "a resident's personalty if permanently located and taxed in another State. Such is "now the law in Alabama, California, Connecticut, Indiana, Louisiana, Maine, "Missouri, New Jersey, Ohio, Rhode Island, South Carolina, Vermont, and "West Virginia. The same rule has been extended by judicial interpretation to "Illinois, Kansas, Missouri, New York, North Carolina, and Ohio. . . . But in "most of the commonwealths the legal fiction, *mobilia personam sequuntur*, still "prevails, and the individual is taxed on all his personalty, irrespective of its "location." *Seligman, Essays in Taxation*, pp. 112, 113. See *Hoyt v. Commissioners*, 23 N. Y. 224; *Mills v. Thornton*, 26 Ill. 300; *Fisher v. Commissioners of Rush County*, 19 Kan. 414; *Alvany v. Powell*, 2 Jones Eq. 51; *State v. Gaylord*, 73 Wis. 316; *Carrier v. Gordon*, 21 Ohio St. 605; *San Francisco v. Flood*, 64 Cal. 504; *Valle v. Ziegler*, 84 Mo. 214; *Meyer v. Pleasant*, 41 La. An. 645.

Domicil is the test of liability to purely personal taxes. *Remey v. Board of Equalization*, 80 Iowa, 470; *Kuntz v. Davidson County*, 6 Lea (Tenn.), 65; *People v. Chenango*, 11 N. Y. 563; *Heinman v. Stover*, 43 Me. 497; *Dow v. Sudbury*, 5 Met. (Mass.) 73. And a domicile once gained continues till another is acquired. *McCutchen v. Rice County*, 2 McCrary C. Ct. 337; *Borland v. Boston*, 132 Mass. 89; 42 Am. Rep. 424; *Kirby's Appeal* (Pa.), 19 Atl. 494; *Nugent v. Bates*, 51 Iowa, 77; 50 N. W. 76.

In the United States the view generally prevails that for purposes of taxation a debt has its situs at the domicile of the creditor. *Kirtland v. Hotchkiss*, 100 U. S. 491; *Murray v. Charlestown*, 96 U. S. 432; *Appeal Tax Court v. Patterson*, 50 Md. 354; *Forseman v. Byrnes*, 68 Ind. 247; *Ferris v. Kemble*, 75 Tex. 476; 12 S. W. 689; *Meyer v. Pleasant*, 41 La. An. 645; 6 So. 258; *San Francisco v. Luz*, 64 Cal. 481; *Insurance Co. v. Board of Assessors*, 44 La. An. 760; *Railey v. Board of Assessors*, 44 La. An. 765; *Boyd v. City of Selma* (Ala.), 11 So. 393; *Poppleton v. Yamhill County*, 8 Oreg. 337; *Babcock v. Board of Equalization*, 65 Iowa, 110; *State v. Gaylord*, 73 Wis. 316; 41 N. W. 521. See *People v. Smith*, 88 N. Y. 576. This rule applies to the public debt of another government, *Bonaparte v. Tax Court*, 104 U. S. 592; and to shares in a foreign corporation, *Sturges v. Carter*, 114 U. S. 511. As to the situs of stocks, bonds, and money of a decedent, for purposes of taxation, see *Gallatin v. Alexander*, 10 Lea (Tenn.), 475; *City of Staunton v. Stout's Exrs.* (Va.) 10 S. E. 5.

It has been held that the locality of a debt is not changed by the fact that it is secured by bond and mortgage on real estate in a State other than that of the creditor's domicile. *Kirtland v. Hotchkiss*, 100 U. S. 491. See *People v. Barker*, 135 N. Y. 656; 32 N. E. 252. But evidences of debt or money, in the

hands of an agent for collection and investment, or even for safe-keeping, are often subjected to taxation, on the ground that they have a *situs* independent of the domicile of the owner. *State Bank v. Richmond*, 79 Va. 113; *Meyer v. Pleasant*, 41 La. An. 645; *Finch v. York County*, 19 Neb. 50; *Herron v. Keenan*, 57 Ind. 472; *Goldart v. People*, 106 Ill. 25; *Curtis v. Rickland*, 56 Mich. 478; *Hutchinson v. Oskaloosa Equalization Board*, 66 Iowa, 35; *State v. St. Louis County Court*, 47 Mo. 594; *Redmond v. Rutherford County Commissioners*, 87 N. C. 122; *Jefferson's Estate*, 35 Minn. 215. See *Walker, Double Taxation*, pp. 106-110. In the case of the State tax on foreign-held bonds, 15 Wall. 300, it was held that a State could not tax the bonds of non-residents secured on property within the State. But see *Railroad Co. v. Collector*, 100 U. S. 595; *Barnes v. Railroad Co.* 17 Wall. 294. See, also, *De Vignier v. New Orleans*, 16 Fed. Rep. 11.

The domicile of a foreign corporation, for the purposes of taxation, is the State of its creation. *Boston Investment Co. v. Boston*, 158 Mass. 461. See, however, *Pelton v. Northern Transportation Co.* 37 Ohio St. 450; *Baltimore v. Passenger Ry. Co.* 57 Md. 31. But a State may tax a foreign corporation, having an office and transacting a part of its business within the State, upon its whole capital and business. *Horn Silver Mining Co. v. New York*, 143 U. S. 305. Since this decision, taxation has been limited in New York by statute, in such cases, to the portion of the capital employed in the State. *People v. Wemple*, 133 N. Y. 323; 31 N. E. 238; *People v. Campbell*, 138 N. Y. 543; 34 N. E. 370. See *State Railroad Tax Cases*, 92 U. S. 575; *W. U. Tel. Co. v. Attorney-General*, 125 U. S. 530. See, as to taxation of corporate shares, *People v. Coleman*, 135 N. Y. 231; 31 N. E. 1022; *Commonwealth v. Standard Oil Co.* 101 Pa. St. 119; *Worth v. Ashe County Commissioners*, 90 N. C. 409; *State v. Smith* (N. J.), 25 Atl. 277; *Foster v. Stevens* (Vt.), 22 Atl. 78. See *Seligman, Essays in Taxation*, pp. 223-242. The property of a corporation may be taxed wherever it is situate. *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18.

As to legacy and inheritance taxes, see *In re Enston's Estate* (N. Y.), 21 N. E. 87; *In re Tulane's Estate*, 51 Hun, 213; *Commonwealth's Appeal*, 129 Pa. St. 338; 18 Atl. 132; 24 W. N. C. 273.

CHAPTER III.

BRITISH NATIONALITY.¹

RULE 20.

- (1) "British subject" means any person who owes permanent² allegiance to the Crown.
- (2) "Natural-born British subject" means a British subject³ who has become a British subject at the moment of his birth.
- (3) "Naturalized British subject" means any British subject who is not a natural-born British subject.⁴
- (4) "Alien" means any person who is not a British subject.

¹ See the Naturalization Act, 1870, 33 & 34 Vict. cap. 14; the Naturalization Act, 1872, 35 & 36 Vict. cap. 39; the Naturalization Act, 1895, 58 & 59 Vict. cap. 43. Conf. 25 Edw. III. stat. 2; 7 Anne, cap. 5, s. 3; 4 Geo. II. cap. 21, s. 1; 13 Geo. III. cap. 21; 7 & 8 Vict. cap. 66; *Westlake*, 3rd ed., chap. xv.; *Foote*, 2nd ed., chap. i.; 1 *Steph. Comm.*, 12th ed., 136; 2 *Ibid.*, 405-410. See App., Note 5, *Acquisition, loss, and resumption of British nationality*.

² "Permanent" allegiance is used to distinguish the allegiance of a British subject from the allegiance of an alien who, because he is within the British dominions, owes "temporary" allegiance to the Crown.

³ Compare *Doe d. Thomas v. Acklam*, 1824, 2 St. Tr. N. s. 106.

⁴ The term "naturalized British subject," as thus defined, includes a denizen who is a person made a British subject by letters of denization granted by the Crown. "The difference between their effect and that of naturalization is 'that a denizen becomes a British subject from the date of the letters but not as from that of his birth, while a naturalized person is placed in the United Kingdom in a position [nearly] equivalent to that of a natural-born subject [at any rate when naturalized under the Naturalization Act, 1870]. . . . The only practical difference now remaining appears to be that no person born out of the British dominions, though 'made a denizen, except such as are born of English parents, shall be capable to be of the privy council, or a member of either house of parliament, or to enjoy any office or place of trust either civil or military, or to have any grant of lands, tenements, or hereditaments from the Crown to himself, or to any other or others in trust for him:' 'st. 12 & 13 Wm. III, cap. 2, s. 3.'" *Westlake*, 3rd ed., p. 327. Compare, however, *Cockburn, Nationality*, p. 28.

- (5) "Statutory alien" means any person who, having been a natural-born British subject, has become an alien in accordance with any of the following Rules.¹

The term includes a widow who, having been a natural-born British subject, has, in accordance with Rules 31 and 32, become an alien by or in consequence of her marriage with an alien.²

- (6) "Disability" means the status of being an infant, lunatic, idiot, or married woman.³
- (7) "Declaration of alienage" means a declaration of a person's desire to be an alien, made in the manner and form provided by the Naturalization Act, 1870.⁴

RULE 21. — Every natural person is either a British subject or an alien.⁵

Comment.

This follows from the definition given of the terms "British subject" and "alien."⁶

More than one state may claim the allegiance of the same individual, and a man whom English Courts treat as a British subject may, by French Courts, be treated as a French citizen.

An alien, further, who has, under the Naturalization Act, 1870,

¹ See Rules 26–29, 31, 35, *post*, and compare Naturalization Act, 1870, ss. 8, 3, 4, and 10.

² *Ibid.*, s. 10, sub-ss. (1) and (2). The term "statutory alien" applies only to a person who has originally been a natural-born British subject. The term, further, does not, it would appear (if the Naturalization Act, 1870, be construed strictly), include a divorced woman who, having been a natural-born British subject, has become an alien by or in consequence of a marriage with an alien, which has been dissolved by divorce. See Rule 33, *post*, and compare the Naturalization Act, 1870, s. 10, sub-s. (2).

³ *Ibid.*, s. 17.

⁴ *Ibid.*, ss. 3, 11.

⁵ Whether a person is in fact a British subject may be, *e. g.*, on a question of extradition, decided by a jury on the facts of the case in accordance with the law determining the acquisition of British nationality. *Guerin v. The Bank of France*, 1888, 5 Times L. R. 160. [*Boyd v. Thayer*, 143 U. S. 135.]

⁶ See p. 173, *ante*.

acquired a certificate of naturalization "shall not, when within "the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to "be a British subject unless he has ceased to be a subject of that "state in pursuance of the laws thereof, or in pursuance of a "treaty to that effect."¹ Hence a person naturalized under the Naturalization Act, 1870, may under some circumstances be held, even by English Courts, to be an alien.

(A) ACQUISITION OF BRITISH NATIONALITY AT BIRTH
(NATURAL-BORN BRITISH SUBJECTS).

RULE 22.²—Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions, is a natural-born British subject.

Comment.

This Rule contains the leading principle of English law on the subject of British nationality.

"Allegiance is the tie, or *ligamen*, which binds the subject to "the King, in return for that protection which the King affords "the subject."³ But every person born within the British dominions does, with very rare exceptions, enjoy at birth the protection of the Crown. Hence, subject to such exceptions, every child born within the British dominions is born "within the allegiance," as the expression goes, of the Crown, and is at and from the moment of his birth a British subject; he is, in other words, a natural-born British subject.

¹ Naturalization Act, 1870, s. 7. See Rule 25, *post*.

² "All persons born within the United Kingdom, or in the colonies, fall "within [the] description [of natural-born British subjects]. And this extends "even to those born of aliens residing in this country, provided their parents "were not at the time in enmity with our sovereign." 2 *Steph. Comm.*, 12th ed., p. 405. See *Cockburn, Nationality*, p. 7, and *Calvin's Case*, 1608, 7 Rep. 18 a. Compare *Re Stepney Election Petition — Isaacson v. Durant*, 1886, 17 Q. B. D. 54, which is quite consistent with Rule 22.

³ 1 *Blackstone*, 366. "Therefore it is truly said that *protectio trahit subjectionem, et subjectio protectionem*." *Calvin's Case*, 1608, 7 Rep. 5 a. It is well to notice that allegiance, though it practically depends upon the place of a person's birth, theoretically depends on a person's being born under the control and within the protection of a particular sovereign, and therefore only indirectly on the place of a person's birth. This consideration explains most of the exceptions to the rule that a person born within British territory is a British subject.

Nationality under this Rule is independent of descent. The child of aliens, if born within any country subject to the Crown, is a natural-born British subject. At common law he could not change his nationality. As things now stand, however, his position is marked by this peculiarity: he can,¹ in general, after he has come of age, renounce British nationality.²

Illustrations.

1. *S*,³ the child of French citizens, is born in London when his parents are there on a visit. *S* is a natural-born British subject.

2. *S*, the child of French citizens, is born at Calcutta. *S* is a natural-born British subject.

3. *S*, the child of French citizens, is born on board a British ship when the ship is on the high seas. *S* is a natural-born British subject.

4. In 1812 *S*, the child of a French prisoner of war, is born in England. *S* is a natural-born British subject.

Exception 1. — Any person who (his father being an alien enemy) is born in a part of the British dominions which at the time of such person's birth is in hostile occupation, is an alien.⁴

Comment.

"If enemies should come into any of the King's dominions, and surprise any castle or fort, and possess the same by hostility, and have issue there, that issue is no subject to the King, though he be born within his dominions, for that he was not born under the King's ligeance or obedience."⁵

Illustration.

A French army, during a war with England, occupy Jersey. *S*, the child of a French soldier, is born in Jersey during the hostile occupation. *S* is an alien.

¹ See Naturalization Act, 1870, s. 4.

² See Rule 28, *post*, and App., Note 5, *Acquisition, loss, and resumption of British nationality*.

³ "*S*" (Subject) throughout this chapter stands for the person whose nationality is in question.

⁴ "British nationality results from birth in the British dominions, except in the case of a child born to an enemy father at a place in hostile occupation." *Westlake*, 3rd ed., pp. 323, 324; *Calvin's Case*, 1608, 7 Rep. 18 a.

⁵ *Calvin's Case*, 1608, 7 Rep. 18 a, 18 b.

Exception 2. — Any person whose father (being an alien) is at the time of such person's birth an ambassador or other diplomatic agent accredited to the Crown by the sovereign of a foreign state is (though born within the British dominions) an alien.¹

Illustrations.

1. *S* is born in London. He is the child of a Frenchman accredited to the Crown as ambassador of the French Republic. *S* is an alien.

2. *S* is born in London. *S* is the child of a Russian ambassador accredited by the Czar to the French Republic, but staying in England at the time of *S*'s birth. *S* (semble) is a natural-born British subject.

RULE 23.² — Subject to the exception hereinafter mentioned, any person

(1) whose father is born within the British dominions,
or

(2) whose paternal grandfather is born within the
British dominions,

is (though not born within the British dominions) a natural-born British subject.

Provided that no person is under this Rule a natural-born British subject whose father is not at the time of such person's birth a natural-born British subject.³

¹ See *Cockburn, Nationality*, p. 7.

² This Rule gives the effect of 7 Anne, cap. 5, s. 3; 4 Geo. II. cap. 21, s. 1; 13 Geo. III. cap. 21. See *Westlake*, 3rd ed., pp. 324–326, ss. 282, 283; 2 *Steph. Comm.*, 12th ed., p. 406; *De Geer v. Stone*, 1882, 22 Ch. D. 243; *In re Willoughby*, 1885, 30 Ch. D. (C. A.) 324.

³ Compare *Doe d. Thomas v. Acklam*, 1824, 2 St. Tr. N. s. 105; and the Naturalization Act, 1870, s. 10, sub-s. (3) (Rule 35, p. 193, *ante*), with *Fitch v. Weber*, 1847, 6 Hare, 51. The last case seems inconsistent with the proviso, but in 1847 a British subject, though he could get himself naturalized in a foreign country by the laws thereof, could not thereby, in the eye of English law, throw off his allegiance to the Crown and cease to be a British subject. A man therefore could, except under treaty, never in strictness cease to be a natural-born British subject. Now, however, a British subject, whether a natural-born or a naturalized British subject, can, by taking the proper steps, become an alien. When a person who is a natural-born British subject thus becomes an alien and ceases to be a British subject at all, he ceases to belong to the class of natural-born British subjects.

Comment and Illustrations.

The principle of the common law is that a person born beyond the limits of the British dominions does not at his birth owe allegiance to the Crown, and cannot therefore be a natural-born British subject. If such a person acquires British nationality at all, he must acquire it at some later period of his life. This principle, however, was before 1870 so far relaxed by legislation that "persons born abroad whose *fathers* (or *grandfathers* "by the father's side) were natural-born subjects are deemed "to be natural-born subjects themselves, to all intents and purposes."¹

1. *A* is born in England. *S*, his son, is born at Naples. *S* is a natural-born British subject.

2. *A* is born in England. *B*, his son, is born at Naples. *S*, the son of *B* and grandson of *A* (*S*'s paternal grandfather), is also born at Naples. *S* is a natural-born British subject.

The proviso is necessitated by the fact that a natural-born British subject may now legally become an alien.² In this case he ceases to be a British subject, and therefore is no longer a natural-born British subject for the purpose of transmitting British nationality.

"We think the sense of these words [*i. e.*, 'natural-born British subject,' in the statute 4 Geo. II. cap. 21] is very plain. Natural-born subjects are mentioned as distinguished from subjects "by donation or any other mode. A child born out of the allegiance of the Crown of England is not entitled to be deemed "a natural-born subject, unless the father be, at the time of the "birth of the child, not a subject only, but a subject by birth. "The two characters of subject and subject by birth must unite "in the father."³

In order, in short, that a child born abroad may, under Rule 23, be a natural-born British subject, his father must at the moment of the child's birth combine two characteristics: viz., first, the characteristic of having been a British subject at the time of his own (the father's) birth, and, secondly, of still retaining the

¹ 2 *Steph. Comm.*, 12th ed., p. 406.

This sums up the effect of 7 Anne, cap. 5, s. 3; 4 Geo. II. cap. 21, s. 1; 13 Geo. III. cap. 21, as interpreted by *De Geer v. Stone*, 1882, 22 Ch. D. 243; *In re Willoughby*, 1865, 30 Ch. D. (C. A.) 324.

² See Rules 26-29, 31-33, and 35, *post*.

³ *Doe d. Thomas v. Acklam*, 1824, 2 St. Tr. N. S. 105, 120, *per Curiam*.

character of a natural-born British subject at the moment of the child's birth. If either of these characteristics is wanting, the child is not a natural-born British subject.

1. *A* is born in England.¹ *A* expatriates himself, and becomes an alien.² *S*, the son of *A*, is born in Italy, after *A* has become an alien. *S* is not a natural-born British subject.³

2. *A* is born in England. *A* becomes an alien.⁴ After *A* has become an alien, *B*, the son of *A* and father of *S*, is born in Italy. *S*, the son of *B* (and grandson of *A*), is born in Italy. *S* is not a natural-born British subject.

3. *A* is born in England. He becomes a statutory alien,⁵ and afterwards is, in accordance with Rule 30, re-admitted to British nationality. After *A* has resumed his British nationality, *S*, his son, is born in Italy. *S* is a natural-born British subject.⁶

4. *A* is born in England. He becomes an alien. After *A* has become an alien, *B*, his son, is born in Italy. *B* becomes a naturalized British subject by obtaining a certificate of naturalization in accordance with Rule 25.⁷ After *B* has become a naturalized British subject, *S*, the son of *B*, is born in Italy. *S* is not a natural-born British subject.⁸

*Exception.*⁹—Any person born out of the British dominions, whose father, though a natural-born British subject, is, at the time of such person's birth, in the actual service of any foreign prince or state in enmity with the Crown, is not a natural-born British subject.

¹ See Rule 22, *ante*.

² See Rules 26–29, *post*.

³ Compare especially, *Doe d. Thomas v. Acklam*, 1824, 2 St. Tr. n. s. 105.

⁴ See Rules 26–29, *post*.

⁵ See Rules 26–29, *post*, and Naturalization Act, 1870, ss. 6, 4, 8.

⁶ Whether *S* is or is not a natural-born British subject depends upon the proper interpretation of the Naturalization Act, 1870, s. 8, which is reproduced in Rule 30, *post*.

⁷ *I. e.*, in accordance with Naturalization Act, 1870, s. 7.

⁸ See comment on Rule 34, *post*. At the time of *S*'s birth, *B*, his father, is a British subject, but he is not a natural-born British subject.

⁹ This Exception gives the effect of 4 Geo. II. cap. 21, s. 2. The same statute contains two other exceptions under which children whose fathers are attainted of high treason by judgment of outlawry or otherwise in the United Kingdom, or whose fathers have rendered themselves liable to the penalties of high treason or felony by returning to the United Kingdom without the license of the Crown, are, if born out of the British dominions, not natural-born British subjects. But these exceptions are (it is conceived) of practical importance (if at all) only as regards the past. The first of them certainly, and the second of them probably, can hardly arise since the passing of the Forfeiture Act, 1870, 33 & 34 Vict. cap. 23, and 20 & 21 Vict. cap. 3.

Illustration.

A is an Englishman born in England. During a war between England and Russia, *A* enters into or remains in the service of the Czar. *S*, the son of *A*, is born at St. Petersburg whilst *A* is in the Russian service. *S* is not a natural-born British subject.

RULE 24.¹ — Any person whose father (being a British subject) is, at the time of such person's birth, an ambassador or other public minister in the service of the Crown, is (though born out of the British dominions) a natural-born British subject.

Comment.

The principle that the child of a British ambassador is, though not born within the British dominions, a natural-born British subject, holds good (it is submitted) only where the ambassador is a British subject. The sole practical importance, therefore, of Rule 24 is that under it a child born abroad may occasionally be a natural-born British subject, where, from the father being a naturalized British subject, or from some other cause, the child is not a natural-born British subject under Rule 23.²

SUB-RULE. — British nationality is not inherited through women.

Illustration.

S is the illegitimate son of an unmarried Englishwoman. He is born in Paris. He is not a British subject.

¹ *Westlake*, s. 281, p. 324. Conf. *Calvin's Case*, 1608, 7 Rep. 18 a.

² See p. 177, *ante*.

(B) ACQUISITION, LOSS, AND RESUMPTION OF BRITISH NATIONALITY AT PERIOD OF LIFE LATER THAN BIRTH.

I. ACQUISITION, LOSS, ETC., BY PERSON NOT BEING UNDER ANY DISABILITY.

(i) *Acquisition.*

RULE 25.¹ — An alien [not being under any disability?] who within such limited time before making the application hereinafter mentioned as may be allowed by one of Her Majesty's Principal Secretaries of State [hereinafter referred to as the Secretary of State], either by general order or on any special occasion, has resided in the United Kingdom for a term of not less than five years, or has been in the service of the Crown for a term of not less than five years, and intends, when naturalized, either to reside in the United Kingdom, or to serve under the Crown, may apply to the Secretary of State for a certificate of naturalization.

The applicant must adduce in support of his application such evidence of his residence or service, and intention to reside or serve, as such Secretary of State may require. The Secretary of State, if satisfied with the evidence adduced, must take the case of the applicant into consideration, and may, with or without assigning any reason, give or withhold a certificate as he thinks most conducive to the public good; and no appeal lies from his decision, but such certificate does not take effect until the applicant has taken the oath of allegiance.

An alien to whom a certificate of naturalization is granted is in the United Kingdom entitled to all political and other rights, powers, and privileges, and is subject to all obligations, to which a natural-born British subject is entitled, or

¹ Naturalization Act, 1870, s. 7. The last two paragraphs of s. 7 are omitted from this Rule; they enable the Secretary of State to grant a certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and to grant a certificate of naturalization under the Naturalization Act, 1870, to an alien who has been naturalized previously to the passing of that Act.

subject in the United Kingdom, with this qualification, that he is not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, to be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty to that effect.

Comment and Illustrations.

This Rule follows in substance, though with one material addition, the terms of the Naturalization Act, 1870, s. 7.

The material addition is the insertion of the words in brackets, "not being under any disability." In this Rule it is, in short, assumed that the Naturalization Act, 1870, s. 7, does not apply to a married woman, an infant, a lunatic, or an idiot.¹ The soundness of this assumption is probable, but not certain. It is hardly, indeed, to be supposed that a certificate of naturalization can be granted to a lunatic or idiot, or, in the face of the Naturalization Act, 1870, s. 10, sub-s. (1),² to a married woman. The only uncertain point is whether, under the Naturalization Act, s. 7, a valid certificate of naturalization may not be applied for, by an infant who has otherwise complied with the conditions laid down in that section and reproduced in this Rule.³

The matters which require consideration are the conditions of application for a certificate of naturalization; the authority of the Secretary of State as to granting a certificate; the effect of a duly obtained certificate; and, lastly, the effect of an unduly obtained certificate.

Conditions. — The right of an alien to apply for a certificate of naturalization is subject to the following conditions: —

The alien must, within the time⁴ allowed by the Secretary of State, have for *five* years *either* resided in the United Kingdom, or been in the service of the Crown.

¹ See p. 174, *ante*.

² This is reproduced in Rule 31, *post*.

³ It is understood that no objection will now be taken by the Secretary of State to the grant of a certificate of naturalization on the ground of the infancy of the applicant, provided the infant's object in applying is to qualify for admission to the army or navy.

⁴ This time is generally eight years, but note that the Secretary of State may on any special occasion allow any other period of time during which the required residence or service may have taken place.

The alien must also intend when naturalized *either* to reside in the United Kingdom, *or* to serve under the Crown.

1. *S* is a French citizen who has resided in London for the last six years, and intends when naturalized to reside in some part of Great Britain or Ireland, or else to serve the Crown, *e. g.*, as a consul in a foreign country. *S* may apply for a certificate of naturalization.

2. *S* is a French citizen. He has been in the service of the Crown as British consul at Boulogne for the last six years. He intends when naturalized to continue his service as consul. *S* may apply for a certificate.

3. *S* is a French citizen, of the age of 22. He has resided in London since he was 16. He intends when naturalized to reside in London. *S* may apply for a certificate.

4. *S* is a French citizen who has resided in Jersey for ten years, and in London for the last two years. He intends when naturalized to reside in London as a clerk in the Foreign Office. He has no right¹ to apply for a certificate.

5. *S* is a French citizen who has resided for the last ten years in London; he intends to settle as a merchant in Jersey. *S* has no right to apply for a certificate. But *S* (*semble*) would have a right to apply if he intended to reside, after obtaining it, for a certain time (*e. g.*, a year) in the United Kingdom, and then to reside as a merchant in Jersey.

Authority of Secretary of State. The Secretary of State, being satisfied with the evidence produced by the applicant of his residence or service, may in his discretion grant or withhold a certificate. *The discretion of the Secretary of State is absolute; no appeal lies from his decision.*²

S is a French citizen. He has been in the service of the Crown as British consul at Boulogne for the last six years. He intends when naturalized to continue his service as consul. He applies for a certificate of naturalization, and gives evidence satisfying the Secretary of State of the above facts. The Secretary of State, without assigning any reason, withholds a certificate. *S* has no appeal from the Secretary's decision.

Duly obtained certificate. The certificate of naturalization, when granted, produces no effect until the applicant has taken the oath of allegiance. When the applicant has taken the oath of allegiance he becomes in the *United Kingdom* entitled to all the

¹ See definition of "United Kingdom," page 65, *ante*.

² But there is nothing in the Act to prevent reiterated applications for a certificate.

rights and subject to all the obligations of a natural-born British subject.

As to these rights, etc., three points are to be noted :—

First. They are rights “within the United Kingdom.” *S*, who has obtained a grant, need not necessarily have all the rights, etc., of a British subject in parts of the British dominions outside the United Kingdom.

Secondly. The grant of British nationality is subject to the qualification that *S*, who has obtained it, is not to be considered a British subject in the country, *e. g.*, France, to which he previously belonged, unless he has ceased to be a French citizen by the laws of France.

Thirdly. *S* is, in regard to the right of transmitting British nationality to his children, in the position of a “*naturalized*,” not of a “*natural-born*,” British subject.¹

Unduly obtained certificate. An applicant for a certificate of naturalization may conceivably satisfy the Secretary of State that he has fulfilled a condition necessary for its attainment, *e. g.*, five years’ residence in the United Kingdom, without having in reality fulfilled it. Suppose that an alien, who has thus irregularly obtained a certificate, thereupon takes the oath of allegiance ; is such a person a naturalized British subject ? The answer must (apparently) be in the affirmative. The fraud by which the certificate has been obtained does not affect its validity. The Secretary’s decision is conclusive, and the law provides no means of annulling or revoking the certificate.²

(ii) *Renunciation.*

RULE 26.³—Any British subject who has at any time before, or may at any time after, the 12th day of May, 1870,⁴ when in any foreign state and not under any disability,

¹ Compare Rules 22, 23, pp. 175, 177, *ante*, and Rule 34, p. 190, *post*, with comment thereon, *post*.

² If, indeed, a married woman should, by representing herself as a widow or a *feme sole*, obtain a certificate of naturalization, the certificate would, if it is submitted, be a nullity, for to hold it valid would be a direct contravention of the Naturalization Act, 1870, s. 10, sub-s. (1). (See Rule 31, *post*.)

³ Naturalization Act, 1870, s. 6, 1st paragraph. Two provisos are omitted which have reference to resumption of British nationality within two years after the passing of the Naturalization Act, 1870, by a British subject who, though he has voluntarily become naturalized in a foreign state, desires to remain a British subject. Note retrospective effect of Rule 6, and see s. 15.

⁴ *I. e.*, date of passing of the Naturalization Act, 1870.

voluntarily become naturalized in such state, is, from and after the time of his so having become naturalized in such foreign state, to be deemed to have ceased to be a British subject and to be regarded as an alien.

Comment.

Under this Rule, any British subject, whether he be a natural-born British subject or a naturalized British subject, can, if he is under no disability, and if he is in a foreign state, by the simple process of being naturalized in such state, cease to be a British subject and become an alien. The Rule applies only to a person who is in a foreign state. It does not apply to a person in the British dominions.

This Rule — and the same remark applies to every other Rule allowing the renunciation or loss of British nationality — embodies a principle unknown to the common law, which was introduced into English law by the Naturalization Act, 1870.

Illustrations.

1. *S* is an Englishman born in England. He goes to New York, and is naturalized as an American citizen. *S* ceases to be a British subject and becomes an alien.

2. *S* is a natural-born British subject residing in England. He is made a French citizen under a law passed by the French National Assembly. He does not cease to be a British subject.

RULE 27.¹ — Where the Crown has entered into a convention with any foreign state to the effect that the subjects or citizens of that state who have been naturalized as British subjects may divest themselves of their status as such subjects, it may be declared, by Order in Council, that such convention has been entered into by the Crown ; and, from and after the date of such Order in Council, any person [not being under any disability (?) and]² being origi-

¹ See Naturalization Act, 1870, s. 3, 1st paragraph, which is followed with slight verbal alterations.

² Nothing is said in the Naturalization Act, 1870, s. 3, as to the person who makes a declaration of alienage not being under any disability. But the section is (it is submitted) certainly not meant to apply either to a married woman, an infant, a lunatic, or an idiot. The words added in brackets are intended to give the effect of the section.

nally a subject or citizen of the state referred to in such Order, who has been naturalized as a British subject, may, within such limit of time as may be provided in the convention, make a declaration of alienage, and from and after the date of his so making such declaration such person is to be regarded as an alien, and as a subject of the state to which he originally belonged as aforesaid.

Comment.

This Rule is practically unimportant. The only conventions which have as yet been made under it are the conventions of the 13th May, 1870, and of the 23rd February, 1871, respectively, between the Crown and the United States of America.

RULE 28.¹ — Any person who by reason of his having been born within the British dominions ² is a natural-born subject, but who also at the time of his birth became under the law of any foreign state a subject of such state, and is still such subject, may, if not under any disability, make a declaration of alienage, and from and after the making of such declaration of alienage such person ceases to be a British subject, *i. e.*, becomes an alien.

Illustration.

S is the son of Italian parents. He is born in London. He is thus a natural-born British subject.³ He is also, under the law of Italy, an Italian subject. When he comes of age, *S* makes a declaration of alienage. He thereby ceases to be a British subject, *i. e.*, becomes an alien.

RULE 29.⁴ — Any person who is born out of the British dominions, of a father being a British subject, may, if not

¹ Naturalization Act, 1870, s. 4 (part).

² See definition of "British dominions," p. 65, *ante*. The actual words of s. 4 are "dominions of Her Majesty."

The reference in s. 4 to full age is omitted, this being covered by words "not under any disability."

³ See Rule 22, p. 175, *ante*.

⁴ Naturalization Act, 1870, s. 4 (part). The reference to full age is omitted as unnecessary.

under any disability, make a declaration of alienage, and from and after the making of such declaration ceases to be a British subject, *i. e.*, becomes an alien.

Illustration.

S is born at Naples. *A*, his father, is an Englishman born in England. *S*, who is thus a natural-born British subject,¹ on coming of age makes a declaration of alienage. He thereby ceases to be a British subject, *i. e.*, becomes an alien.

(iii) *Resumption.*

RULE 30.² — Any statutory alien [not being under any disability ?] may, on performing the same conditions and adducing the same evidence as is required under Rule 25 in the case of an alien applying for a certificate of naturalization,³ apply to the Secretary of State for a certificate (hereinafter referred to as a certificate of re-admission to British nationality) re-admitting him to the status of a British subject. The Secretary of State has the same discretion as to the giving or withholding of the certificate as in the case of a certificate of naturalization, and an oath of allegiance is in like manner required previously to the issuing of the certificate.

A statutory alien to whom a certificate of re-admission to British nationality has been granted, from the date of the certificate of re-admission, but not in respect of any previous transaction, resumes his position as a British subject; with this qualification, that, within the limits of the foreign state of which he became a subject, he is not to be deemed to be a British subject unless he has ceased to be a subject of that foreign state according to the laws thereof, or in pursuance of a treaty to that effect.

¹ See Rule 23, p. 177, *ante*.

² The Naturalization Act, 1870, s. 8, slightly curtailed. See also, s. 10, sub-s. (2), and compare definition of "statutory alien," Rule 20, p. 173, *ante*. The importance of this is that the term "statutory alien" applies only to a person who has been a "natural-born" British subject.

³ The expression in the Naturalization Act, 1870, s. 8, is certificate of "nationality." But what is clearly meant is a certificate of naturalization.

The jurisdiction exercisable under this Rule by the Secretary of State in the United Kingdom in respect of the grant of a certificate of re-admission to British nationality, in the case of any statutory alien being in any British possession, may be exercised by the governor of such possession; and residence in such possession is, in the case of such person, to be deemed equivalent to residence in the United Kingdom.

Comment.

Under this Rule any natural-born British subject who has become a statutory alien¹ can, subject to the limitations laid down in the Rule, "resume" his position, not only as a "British subject," but also as a *natural-born* British subject. If this were not so, the Rule² would be superfluous, since a statutory alien might, like any other alien, become a *naturalized* British subject under Rule 25.³

There is no special rule as to the resumption of British nationality by a naturalized alien who has lost or renounced British nationality. He stands apparently in the same position as an alien who has never been a British subject.

In this Rule the term "British possession" means in any colony, plantation, island, or settlement within the British dominions, but not within the United Kingdom; and the word "governor" includes any person exercising the chief authority in a British possession.⁴

Illustrations.

1. *S* is a natural-born British subject. He becomes a French citizen, and thereby ceases to be a British subject.⁵ He has re-

¹ See definition of "statutory alien," Rule 20, p. 173, *ante*, and note that it includes a widow who, having been a natural-born British subject, has become an alien in consequence of her marriage with an alien (see Rules 31, 32, *post*). She may, therefore, during widowhood obtain a certificate of re-admission to British nationality under Rule 30. Conf. the Naturalization Act, 1870, s. 8, and s. 10 (2).

² *I. e.*, the Naturalization Act, 1870, s. 8.

³ See p. 181, *ante*, and the Naturalization Act, 1870, s. 7. The conclusion, in short, that a statutory alien, on obtaining a certificate of re-admission to British nationality, "resumes his position" as a *natural-born* British subject results from a comparison of ss. 7 and 8 of the Naturalization Act, 1870.

⁴ Conf. Naturalization Act, 1870, ss. 8, 17.

⁵ See Rule 26, p. 184, *ante*.

sided for the last six years either in Jamaica or in London. He may apply for a certificate of re-admission to British nationality.

2. *S* is an Englishwoman born in England. She marries a French citizen, and thereby becomes a statutory alien.¹ After the death of her husband she returns to England, and resides there unmarried for five years. She may apply for a certificate of re-admission to British nationality.

II. ACQUISITION, LOSS, ETC., BY PERSON BEING UNDER DISABILITY.

(i) *Married Woman.*

RULE 31.²— A married woman is to be deemed to be a subject of the state of which her husband is for the time being a subject.

Comment.

This Rule embodies a complete change in the law of England. By the common law marriage does not affect a woman's nationality. Now, in virtue of the Naturalization Act, 1870, s. 10, her nationality varies under English law with that of her husband.

Illustrations.

1. *S* is a Frenchwoman born in France. She marries a British subject. She becomes a British subject.

2. *S* is an Englishwoman born in England. She marries a French citizen domiciled in London. She thereupon is deemed to be a French citizen, and becomes a statutory alien.³

RULE 32.⁴— A widow continues to be the subject of the state of which her late husband was at his death a subject, until she changes her nationality.

¹ See Rule 31.

² Naturalization Act, 1870, s. 10 (1).

³ Under French law, a foreign woman who marries a Frenchman follows the status of her husband. *S*, therefore, in fact becomes on her marriage a French citizen. Semble, however, she would under the Naturalization Act, 1870, be "deemed to be" a French citizen in England even if she were not so in fact under French law.

⁴ Compare Naturalization Act, 1870, s. 10, sub-ss. (1) and (2).

Comment and Illustration.

This Rule is not, in so many words, laid down in the Naturalization Act, 1870; it may, however, be reasonably deduced from the Naturalization Act, 1870, s. 10, sub-ss. (1) and (2).

S is a natural-born British subject. She marries a French citizen living and domiciled in England. She never leaves England till his death. On the death of her husband she remains a French citizen.

RULE 33. — A divorced woman continues to be the subject of the state of which her husband was a subject immediately before or at the moment of divorce, until she changes her nationality (?).

Comment.

This Rule is conjectural. It does not rest on any direct statutory authority; it is merely an inference from the Naturalization Act, 1870, s. 10, sub-ss. (1) and (2).

Illustrations.

1. *S* is an Englishwoman born in England. She marries a French citizen domiciled in London. They are divorced by the High Court. *S* (semble) remains a French subject.

2. *S* is a Frenchwoman born in France. She marries a British subject residing and domiciled in France. After ten years' continuous residence in France they are there divorced. *S* (semble) remains a British subject.

(ii) *Infant.*

RULE 34.² — Where a father, or a mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother, who during infancy has become resident with such father or mother in any part of the United Kingdom, or with such father while in the service of the Crown out of the United Kingdom,³ is to be deemed to be a naturalized British subject.

¹ See Rules 31, 32, *ante*.

² Naturalization Act, 1870, s. 10, sub-s. (5).

³ See the Naturalization Act, 1895 (58 & 59 Vict. cap. 43), ss. 1, 2.

[This Rule applies (semble) to children born out of the British dominions as well after as before the parent's naturalization.]¹

Comment.

The naturalization of an alien does not of itself, and independently of statute, affect the nationality of his children, and this whether they are born before or after his own naturalization. If they are born within the British dominions they are natural-born British subjects, without any reference to their father's nationality.² If they are born outside the British dominions, before his naturalization, they are clearly at common law aliens, and, if they are so born after his naturalization, they are also apparently aliens.³

The Naturalization Act, 1870, s. 10, sub-s. (5), which Rule 34 reproduces, fixes the conditions under which the children of a naturalized British subject⁴ may themselves become British subjects. This enactment, as is assumed in the Rule, applies to children born as well before as after the parent's naturalization.

Conditions. — The conditions under which the child of a naturalized British subject becomes himself a naturalized British subject are two : —

First. The child must *during infancy* become resident in some part of the United Kingdom, or in some country out of the United Kingdom where the *father* is acting in the service of the Crown.

The expression "during infancy" is ambiguous.

It cannot, from the nature of things, mean the whole period of infancy, but it may mean either the whole or a part of the remainder of the child's infancy. If it means a part, what part or proportion of the child's infancy is meant? The answer (it is submitted) must be that the period intended is indefinite, and that

¹ These words are not in the Naturalization Act, 1870, but are added to give what is conceived to be the effect of s. 10, sub-s. (5).

² See Rule 22, p. 175, *ante*.

³ This, it is submitted, is the effect of 7 Anne, cap. 5, s. 3 ; 4 Geo. II. cap. 21, s. 1 ; 13 Geo. III. cap. 21, taken together with the Naturalization Act, 1870, s. 10. Compare *De Geer v. Stone*, 1882, 22 Ch. D. 243. The position, however, as to nationality of the children of a naturalized alien, who after his naturalization are born out of the British dominions, is not quite clear. The point is referred to but not decided by *In re Bourgoise*, 1889, 41 Ch. D. (C. A.) 310. See especially, judgment of *Cotton*, L. J., p. 320, and of *Lindley*, L. J., p. 321, and 5 *Law Q. Rev.* 438.

⁴ See Rule 25, p. 181, *ante*.

the words "during infancy" mean such part of the child's infancy as is sufficient to constitute residence. Still the words, taken as they are from an Act of Parliament, are deplorably vague. The difficulty of construing them is increased by the consideration that "infancy" is not a term of Scotch law, though Scotland is part of the United Kingdom.

Second. The residence must be *residence with* the parent who has obtained a certificate of naturalization.

What circumstances amount to residence of a child with a parent must in each case be a question of fact.

Illustrations.

In the following illustrations, *A* is a French citizen who has obtained a grant of naturalization under the Naturalization Act, 1870; *S* is *A*'s son, born in France.

1. *S* is born before the date of *A*'s naturalization as a British subject, at which date *S* is two years old. *A* lives in London, and *S* lives with him till *S* is 21 years of age. *S* is a naturalized British subject.

2. The circumstances are the same as in the foregoing illustration, except that *S* is born after *A* has become a naturalized British subject. *S* is a naturalized British subject.

3. At the time when *A* becomes a naturalized British subject *S* is 16 years of age, and has not hitherto resided in the United Kingdom. From the time *A* becomes a British subject, *S* resides with *A* in London till he attains the age of 19, and then goes to reside in France, where he lives till he is 26. *S* (semble) is a naturalized British subject.¹

4. *S*, at the time of *A*'s naturalization, is 15 years of age; he continues living in France and never comes to the United Kingdom till he is 22 years old. *S* is not a British subject.

5. *S* is born after *A*'s naturalization, but never resides in the United Kingdom till he is 22 years of age. *S* (semble) is not a British subject.²

6. *S* being born before *A*'s naturalization lives from the time of such naturalization at *A*'s house in Jersey as his home up to the time of *S*'s coming of age. *S* is not a British subject. Jersey is not part of the United Kingdom.

¹ This apparently is so, for *S* has resided "during infancy" with his father *A* in the United Kingdom. If, however, the words "during infancy" mean till the period of infancy has expired, then *S* is not a British subject.

² But see note 3, p. 191, *ante*.

7. *A* after his naturalization resides in France. *S*, who is born before *A*'s naturalization, is at that time 15 years old, and lives for the rest of his infancy as a clerk in London. *S* is not a British subject, for *S*, though he has resided in the United Kingdom, has not resided there with *A*.

8. After *A*'s naturalization, and during the rest of *S*'s infancy, *A* lives habitually in London, and *S*, being in business at Glasgow, resides there. *S* (*semble*) is not a British subject, for he has not resided *with A* in the United Kingdom.¹

RULE 35.² — Where a father being a British subject, or a mother being a British subject and a widow, becomes an alien under any of the foregoing Rules,³ every child of such father or mother who during infancy has become resident in the country⁴ where the father or mother is naturalized, and has, according to the laws of such country, become naturalized therein, is to be deemed to be a subject of the state of which the father or mother has become a subject, and not a British subject.

Comment.

This Rule reproduces in substance the Naturalization Act, 1870, s. 10, sub-s. (3).

The conditions under which an infant becomes an alien are three: —

First. The father or the mother must have become an alien, and have become naturalized in a foreign country.

It would seem that the mother must continue a widow at the moment when she becomes an alien. In other words, the Naturalization Act, 1870, s. 10, sub-s. (3), or, what is the same thing, the Rule grounded upon it, does not, it is submitted, apply to the case of a widow who, being a British subject, becomes an alien by marriage with a foreigner, *e. g.*, a Frenchman.⁵

¹ This is doubtful, and depends on the meaning of the words "reside with," which may, and probably do, mean "have a home with the parent," or may mean, though they probably do not mean, "reside in the United Kingdom" at the same time as the parent.

² Naturalization Act, 1870, s. 10 sub-s. (3).

³ See Rules 26–29, pp. 184–186, *ante*, and compare Rule 31, p. 189, *ante*.

⁴ In the Naturalization Act, 1870, s. 10, sub-s. (3), no distinction appears to be drawn between "country" and "state." See pp. 64, 66–68, *ante*.

⁵ This conclusion, which, however, is not certain, rests on the following grounds: —

Secondly. The child must become "during infancy"¹ resident in the country where the parent, *i. e.*, the father, or the mother being a widow, is naturalized. Though the child must be resident in such country, he need not be resident "with the parent."

Thirdly. The child must, according to the law of such country, have become naturalized therein.

Illustrations.

1. *S*, a natural-born British subject, is the child of *A*, also a natural-born British subject. When *S* is 15, *A* is living in France, and becomes a French citizen, and thereby a statutory alien. *S*, from the time he is 15 up to the age of 23, lives in France, and in consequence of his father's naturalization is, under French law, a French citizen.² *S* is an alien.

2. *A* is a natural-born British subject. Whilst *A* is living in France he becomes a naturalized French citizen, and therefore a statutory alien. *S*, *A*'s son, is, after *A*'s naturalization, born in England. *S*, from the time he is two years old till he attains the age of 22, lives in France. *S* is, under French law, a French citizen. *S* (*semble*) becomes an alien.³

3. *S* is a natural-born British subject, the child of *A*, also a natural-born British subject. When *S* is 15, *A* and *S* are living in Russia. *A* becomes a naturalized Russian subject, and therefore a statutory alien. *S* continues living in Russia till the age of 22. *S* is not, under Russian law, a Russian subject.⁴ *S* remains a British subject.

(1) The widow does not become an alien "being a widow," but after she has ceased to be a widow.

(2) She possibly does not become an alien "in pursuance of" the Naturalization Act, 1870. The words "in pursuance of" are in s. 10, sub-s. (3).

(3) Her becoming an alien under the Act does not of itself involve her being "naturalized in" a foreign country, and s. 10, sub-s. (3) (*i. e.*, Rule 35), only applies where such naturalization takes place.

(4) This construction of the enactment is confirmed by a comparison with the Naturalization Act, 1870, s. 10, sub-s. (4), which is reproduced in Rule 36, *post*.

¹ See pp. 191, 192, *ante*.

² "Children under age of a father or of a mother surviving her husband, who becomes naturalized a French citizen, become French citizens, unless, within the year after their attaining majority, they decline this status." See French Nationality, Law of June 26, 1889, Art. 12, cited *Parl. Paper*, *Mis. No. 3* (1893), C. 7027, p. 46.

³ Whether *S*'s case may not fall within Rule 22 and Rule 28, *ante*? If it does fall under these Rules, *S* remains a British subject until he makes a declaration of alienage.

⁴ The admission to Russian allegiance is always personal, and does not affect

4. *A* is the widow of an Englishman and natural-born British subject. *S* is her son, age 15, born during the lifetime of her husband. *A*, when *S* is 15, marries a French citizen, and thereby becomes an alien. *S* lives in France from his mother's marriage up to the age of 23. *S*, under French law, is a French citizen.¹ *S* (semble) remains a British subject.²

RULE 36.³—Where a father, or a mother being a widow, has obtained a certificate of re-admission to British nationality, every child of such father or mother, who during infancy has become resident in the British dominions with such father or mother, is to be deemed to have resumed the position of a British subject to all intents.

Illustrations.

1. *A* is a natural-born British subject. *S*, his son, is born in France. Immediately after the birth of *S*, *A*, who is living in France, becomes a naturalized French citizen, and thereby an alien.⁴ *S* (semble) becomes, under French law, a French subject. When *S* is 16, *A*, who has been living for five years with *S* in England, is re-admitted to British nationality.⁵ *S* lives with *A* in England till the age of 22. *S* resumes⁶ the position of a British subject.

2. *A* is a natural-born British subject. He becomes naturalized in France, and thereby becomes a statutory alien. *S*, the son of *A*, is born in France after *A* has become a French citizen. *S* then resides with *A* in London until *S* attains the age of 21. *A*, when *S* is of the age of 18, obtains a certificate of re-admission to British nationality.⁷ *S* (semble) thereupon becomes a British⁸ subject (?).

3. *W*, an Englishwoman, marries *A*, also a natural-born British children, whether of age or minors previously born. See *Parl. Paper*, Mis. No. 3 (1893), C. 7027, p. 81, s. 1015.

¹ See Law of Nationality, 1889, Art. 12, cited *Parl. Paper*, Mis. No. 3 (1893), C. 7027, p. 46.

² See p. 193, *ante*.

³ Naturalization Act, s. 10, sub-s. (4).

⁴ See Rule 26, p. 184, *ante*.

⁵ See Rule 30, p. 187, *ante*.

⁶ At what date does *A* resume British nationality? Does *S* become again a natural-born British subject?

⁷ See Rule 30, p. 187, *ante*.

⁸ Whether *S*, who has never been a British subject, can be "deemed to have resumed" the position of a British subject?

subject. *S* is their son. After the birth of *S*, *A*, being in a foreign country,¹ is there naturalized; and *S*, living there with *A*, becomes under the law of that country naturalized therein. *A* dies. Thereupon *W*, his widow, and *S* reside in London. *W*, when *S* is 19, is re-admitted to British nationality.² *S* resumes the position of a British subject.

RULE 37. — Subject to the exceptions hereinafter mentioned, any person who is not a British subject under Rules 20 to 36, is an alien.

Comment.

The foregoing Rules state the circumstances under which a person is, or is not, a British subject according to the principles of the common law, as modified by certain general statutes, and especially by the Naturalization Act, 1870. Any one, therefore, who cannot be shown to be either a natural-born or a naturalized British subject under some one or more of these Rules is *primâ facie* an alien.

These Rules, however, are not exhaustive, at any rate as regards the acquisition of British nationality. There exist more than one exceptional method under which British nationality may be or may have been acquired. These exceptional methods of acquisition, of which this treatise does not give a detailed account, form the exceptions to Rule 36.

Illustrations.

1. *A* is a natural-born British subject born in London.³ *B*, his son, born at Naples,⁴ is a natural-born British subject. *C*, the son of *B* and grandson of *A*, is born at Naples,⁵ and is also a natural-born British subject. *S*, the son of *C* and great-grandson of *A*, is born at Naples. *S* is an alien.⁶

2. *A* is an Italian subject. *S*, the son of *A*, is born at Naples in 1860. In 1871 *A* becomes a naturalized British subject under Rule 25, and resides permanently in England. *S* continues to

¹ See Rule 26, p. 184, *ante*.

² See Rules 30, 31, pp. 187, 189, *ante*.

³ See Rule 22, p. 175, *ante*.

⁴ See Rule 23, p. 177, *ante*.

⁵ See Rule 23, p. 177, *ante*.

⁶ *I. e.*, *S* does not fall within either Rule 22 or Rule 23, *ante*. Compare *De Geer v. Stone*, 1882, 22 Ch. D. 243.

reside in Italy till he is 22. He then comes to live with his parents in London. He is an alien.¹

3. *S* is the illegitimate son of English parents, both of whom are natural-born British subjects. He is born at New York. *S* is an alien.²

4. *S* is the illegitimate son of French citizens. *S* is born at Paris. After the birth of *S*, *A*, his father, becomes a naturalized British subject in accordance with Rule 25. *S* during his infancy lives with *A* in London. *S* is an alien.³

5. *S* is the son of natural-born British parents domiciled at Amsterdam. He is born in Holland, before the marriage of his parents. After his birth his parents, being still domiciled in Holland, intermarry, and by the law of Holland *S* is made legitimate.⁴ Whether *S* is a British subject? ⁵

6. *S* is the son of an Italian subject married to an Englishwoman who was a natural-born British subject. On the death of *S*'s father, immediately after the birth of *S*, his mother returns with *S* to England. She does not obtain a certificate of re-admission to British nationality, but she marries an Englishman as her second husband. *S* resides with his mother in England till he is 22. *S* is (semble) an alien.⁶

7. *A* is an Englishman born in England. In 1860 he is in France, and is under French law made a naturalized French citizen. *S*, his son, is born in 1865, and lives in France till 1894. After the passing of the Naturalization Act, 1870, *A* becomes an alien as from 1860.⁷ In 1871 *A* is re-admitted to British nationality. *S* has not made any declaration of alienage. Whether *S* is an alien? ⁸

8. *A* is a natural-born British subject. In 1865 *A* in France becomes a naturalized French citizen, and thereby, in accordance

¹ *I. e.*, he does not come within Rule 34, p. 190, *ante*, since he has not resided in the United Kingdom during infancy.

² See *Shedden v. Patrick*, 1854, 1 Macq. 535.

³ See *Shedden v. Patrick*, 1854, 1 Macq. 535.

⁴ See Rule 134, *post*.

⁵ See *Shedden v. Patrick*, 1854, 1 Macq. 535. Compare, however, *In re Goodman's Trusts*, 1881, 17 Ch. D. (C. A.) 266, and Rule 134, *post*.

⁶ Compare Rule 31 and Rule 34, pp. 189, 190, *ante*.

⁷ See Rule 26, p. 184, *ante*.

⁸ *S* at his birth was according to English law a natural-born British subject, since in 1860 *A* could not renounce British nationality. Whether *S* is or is not a British subject depends upon the effect to be given to the Naturalization Act, 1870, s. 6, which is embodied in Rule 26, p. 184, *ante*, taken with the Naturalization Act, 1870, s. 10 sub-s. (3), which is embodied in Rule 35, p. 193, *ante*.

with Rule 26, becomes after 12th May, 1870, a statutory alien. In 1871 *A* is re-admitted to British nationality. *S*, the son of *A*, is born in France immediately after *A*'s re-admission to British nationality, and lives till he is 22 wholly in France. Whether *S* is a British subject? Semble, he is.¹

9. *W*, a Frenchwoman and a widow, obtains a certificate of naturalization. She resides in Jersey in the service of the Crown. *S*, her son, who at the time of her naturalization is 10 years old, lives with her in Jersey till he is 22. *S* is an alien.²

Exception 1.— Any person is a British subject³ who is made so by virtue of letters of denization.

Comment.

The Crown has still power to grant letters of denization,⁴ and a denizen, as already pointed out, is within our definition of a British subject.⁵

Exception 2.— Any person is a British subject who is naturalized under or by any Act of Parliament.

Comment.

1. A person may still be naturalized under a special Naturalization Act. He then becomes, of course, a naturalized British subject. The exact effect of the Act, *e. g.*, how far it affects past transactions, depends upon the terms of the particular enactment.

2. A person may have been naturalized under some earlier general Naturalization Act, such for example as 7 & 8 Vict. cap. 66.

Exception 3.— Any person is a British subject within the limits of any British possession, *i. e.*, of any colony, plantation, island, territory, or settlement in the British dominions,⁶ who is naturalized by any law duly made by the legislature of such possession.

¹ Compare Rule 30, p. 187, *ante*.

S is the son of a natural-born British subject, who, though he at one time lost British nationality, has "resumed" his position as a British subject (see the Naturalization Act, 1870, s. 8), and, it is submitted, has therefore become again a natural-born British subject. If so, *S* comes within Rule 23.

² The provisions of Rule 34, as to residence out of the United Kingdom in the service of the Crown, apply only where the father of the infant is in such service. See Naturalization Act, 1895, ss. 1, 2.

³ For meaning of "British subject," see p. 173, *ante*.

⁴ "Nothing in this Act contained shall affect the grant of letters of denization by Her Majesty." Naturalization Act, 1870, s. 14.

⁵ See p. 173, *ante*.

⁶ "And not within the United Kingdom." See Naturalization Act, 1870, s. 17.

Comment.

“All laws, statutes, and ordinances which may be duly made
“by the legislature of any British possession for imparting to any
“person the privileges, or any of the privileges, of naturalization,
“to be enjoyed by such person within the limits of such possession,
“shall within such limits have the authority of law, but shall
“be subject to be confirmed or disallowed by Her Majesty in the
“same manner, and subject to the same rules in and subject to
“which Her Majesty has power to confirm or disallow any other
“laws, statutes, or ordinances in that possession.”¹

¹ The Naturalization Act, 1870, s. 16.

AMERICAN NOTES.

CHAPTER III.

AMERICAN NATIONALITY.

1. TERMS "CITIZEN" AND "CITIZENSHIP."—By the term "citizen" or "citizenship," in these notes on American Nationality, is meant a citizen or citizenship of the United States. The conditions of State citizenship greatly vary in the different States, some requiring, as a prerequisite of the exercise of the elective franchise, the possession of citizenship of the United States; while others require only that the person, if of foreign nationality, shall have made a declaration of intention to become a citizen of the United States (*State v. Fowler*, 41 La. An. 380; 6 So. 602); but the requirement in such case of citizenship, or of a declaration of intention to become a citizen, of the United States, is generally coupled with a requirement of residence for a certain period within the State. Citizenship of a State does not, however, confer citizenship of the United States (*Boyd v. Thayer*, 143 U. S. 135; *Minneapolis v. Reum*, 56 Fed. Rep. 576; 6 C. C. A. 31); and it is only those who are citizens of the United States that can be considered as clothed with American nationality, apart from the special national character that may result from domicile, particularly in matters of belligerency.

The Constitution of the United States (Art. IV. s. 2, par. 1) provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" and by the fourteenth amendment it is provided that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." *Boyd v. Thayer*, 143 U. S. 135; *Vines v. State*, 67 Ala. 73.

The following Statutes of the United States relate to citizenship: March 26, 1790 (1 Stats. at Large, 103); January 29, 1795 (1 Stats. at Large, 414); June 18, 1798 (1 Stats. at Large, 566); April 14, 1802 (2 Stats. at Large, 153); March 26, 1804 (2 Stats. at Large, 292); March 3, 1813 (2 Stats. at Large, 811); July 30, 1813 (3 Stats. at Large, 53); March 22, 1816 (3 Stats. at Large, 258); May 26, 1824 (4 Stats. at Large, 69); May 24, 1828 (4 Stats. at Large, 310); June 26, 1848 (9 Stats. at Large, 240); February 10, 1855 (10 Stats. at Large, 604); July 17, 1862 (12 Stats. at Large, 597); April 9, 1866 (14 Stats. at Large, 27); July 27, 1868 (15 Stats. at Large, 223); s. 5, June 17, 1870 (16 Stats. at Large, 153); July 14, 1870 (16 Stats. at Large, 254); s. 29, June 7, 1872 (17 Stats. at Large, 268); Revised Statutes, ss. 1992-2001, 2165-2174, 4075-4078, 4749, 5424-5429; February 18, 1875 (18 Stats. at Large, 318); February 1, 1876 (19 Stats. at Large, 2); s. 24, May 18, 1882 (22 Stats. at Large, 61); July 26, 1894 (Stats. 1893-94, pp. 123, 124).

2. (Rule 22.) CITIZENSHIP BY BIRTH.—By the fourteenth amendment of the Constitution of the United States, "all persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." *Lynch v. Clarke*, 1 Sandf. Ch.

584. This provision has been held to apply to a child born in the United States of alien Chinese parents, who could not themselves become citizens by naturalization. *In re Look Tin Sing*, 21 Fed. Rep. 905. See, also, *Quock Ting v. United States*, 140 U. S. 417, 11 S. Ct. Rep. 733. But Mr. Justice Miller, delivering the opinion of the Court in the *Slaughter-house Cases*, said, *obiter*: "The phrase, 'subject to its jurisdiction,' was intended to exclude from its (the "fourteenth amendment's) operation children of ministers, consuls, and citizens, or subjects of foreign states born within the United States." 16 Wall. 36, 73. Compare *Miller on the Constitution*, p. 279. In *Elk v. Wilkins* the Supreme Court said that the phrase, "subject to the jurisdiction thereof," meant, "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and "owing them direct and immediate allegiance." 102 U. S. 94, 102. The point has not, however, been authoritatively decided by the Supreme Court. By the Civil Rights Act of April 9, 1866 (14 Stats. at Large, 27), "all persons born "in the United States and not subject to any foreign power, are declared to be "citizens of the United States;" and this provision is embodied in s. 1992 of the Revised Statutes of the United States, 29 Am. Law Rev. 385; 7 Am. Law Rev. 352, 353. See *Minor v. Happersett*, 21 Wall. 162; *In re Look Tin Sing*, 21 Fed. Rep. 905; *United States v. Rhodes*, 1 Abb. 40; "A Question of Citizenship," *The Nation* (N. Y.), Aug. 23, 1894; *Lynch v. Clarke*, 1 Sandf. Ch. 583 (1844).

Members of an Indian tribe born within the United States, though they afterward voluntarily separate themselves from their tribe and take up their residence among white citizens, are not within the purview of the fourteenth amendment. *Elk v. Wilkins*, 112 U. S. 94.

3. (Rules 23, 24.) FOREIGN-BORN CHILDREN OF CITIZENS. — By section 1993 of the Revised Statutes of the United States, incorporating the provisions of the Act of February 10, 1855, "All children born or hereafter born out of "the limits and jurisdiction of the United States, whose fathers were or may "be at the time of their birth citizens thereof, are declared to be citizens of "the United States; but the rights of citizenship shall not descend to children "whose fathers never resided in the United States." See *Ludlam v. Ludlam*, 26 N. Y. 356; *Albany v. Derby*, 30 Vt. 718; *Ware v. Wisner*, 50 Fed. Rep. 310. Under the statutory provision just quoted, nationality is not inherited through women.

4. (Rule 25.) NATURALIZATION. — The ordinary legal conditions of naturalization are:—

- (1) A declaration of intention to become a citizen, made at least two years prior to admission to citizenship;
- (2) an oath of allegiance, made at the time of admission;
- (3) residence within the United States of at least five years, and within the State or Territory where the Court is held of at least one year;
- (4) behaviour as a moral and orderly person during such residence;
- (5) renunciation of hereditary title, or order of nobility, if any. See, further, Rev. Stats. of U. S. ss. 2165-2174; *Behrensmeier v. Kreitz*, 135 Ill. 591. Conviction of perjury, during residence in the United States, disqualifies for admission to citizenship. *In re Spencer*, 5 Sawyer C. C. 195.

The declaration of intention to become a citizen does not confer citizenship. *Minneapolis v. Reum*, 56 Fed. Rep. 576; 6 C. C. A. 31; *White v. White*, 2 Met. (Ky.) 186; 2 *Wharton's Int. Law Dig.* ss. 175, 192. See *Settegast v. Schrimpf*, 35 Tex. 323. The making of such a declaration two years previously to admission to citizenship is not required of an alien who has continuously resided in the United States for a period of five years, three of which immediately preceded his arriving at age. *Minneapolis v. Reum*, 56 Fed. Rep. 576; 6 C. C. A. 31. See, also, *State v. Macdonald*, 24 Minn. 48; *Ex parte Cregg*, 2 Curtis C. C. 98; *State v. Whittemore*, 50 N. H. 245; *Butterworth's Case*, 1 Wood. & M. 323; *Ex parte Randall*, 14 Phila. 224; *Ex parte Merry*, 14 Phila. 212. As to the declaration of intention to elect American citizenship under the treaty with Mexico of 1848, see *Quintana v. Tomkins*, 1 N. M. 29; *Carter v. Territory*, 1 N. M. 317.

An alien seaman, who has duly declared his intention to become a citizen, and who has thereafter served for three years on board of a merchant vessel of the United States, may be admitted to citizenship. Rev. Stats. of U. S. s. 2174. This statute does not include seamen in the navy. *Ex parte Gormley*, 14 Phila. 211. But, by Act of July 26, 1894 (Stats. at Large, 1893-94, pp. 123, 124), an alien of the age of twenty-one years or upwards, who has enlisted in the United States Navy or Marine Corps, and has thereafter served five consecutive years in the navy or one enlistment in the Marine Corps, may be admitted to citizenship without a previous declaration of intention.

Chinese, since they are neither "white persons" nor persons of the African race, are not within the general statutes relating to naturalization (Rev. Stats. of U. S. s. 2169; Act of February 18, 1875, 18 Stats. at Large, 318). *In re Ah Yup*, 5 Sawyer C. C. 155. And by section 24, Act of May 18, 1882 (22 Stats. at Large, 61), they are expressly excluded from naturalization. *In re Hong Yen Chang*, 84 Cal. 163.

Japanese also have been refused naturalization, on the ground that they are not "white persons." *In re Saito*, 62 Fed. Rep. 126, criticised in 28 Am. Law Rev. 818.

American Indians, though capable of naturalization by law or by treaty, are not within the general statutes relating to naturalization. *Elk v. Wilkins*, 112 U. S. 94. Nor is a person of half white and half Indian blood. *In re Camille*, 6 Sawyer C. C. 541.

Naturalization is a judicial act, which must be performed by the Court. *The Acorn*, 2 Abb. 434; *Matter of Clark*, 18 Barb. 444; *McCarthy v. Marsh*, 1 Seld. (N. Y.) 263; *Green v. Salas*, 31 Fed. Rep. 106; *In re Coleman*, 15 Blatchf. C. C. 420; *In re An Alien*, 7 Hill, 137. The declaration of intention may be made before the clerk of the Court. Act of January 25, 1876, 19 Stats. at Large, 2.

Though the decree or order of naturalization, generally but inaccurately styled a judgment, cannot be impeached collaterally (*State v. Macdonald*, 24 Minn. 48), yet it may, if fraudulent, be repudiated by the government. 2 *Wharton's Int. Law Dig.* s. 174 a. The record must show that the necessary proceedings were taken. *Re Desty*, 8 Abb. (N. Y.) N. Cas. 250; *Green v. Salas*, 31 Fed. Rep. 106, and cases cited. But its efficacy is not impaired by inaccurate recitals (*In re McCoppin*, 5 Sawyer C. C. 630; *In re Coleman*, 15 Blatchf. C. C. 406); and it may be amended *nunc pro tunc* to correct clerical errors. *State v. Macdonald*, 24 Minn. 48. The decree of naturalization does not operate retroactively. *Dryden v. Swinburne*, 20 W. Va. 89.

The proper evidence of naturalization is the judicial record, or an exemplified copy of it, and parol evidence is admissible only in case of the loss or destruction of such record. *Green v. Salas*, 31 Fed. Rep. 106; *Slade v. Minor*, 2 Cranch C. C. 139; *Dryden v. Swinburne*, 20 W. Va. 89; *People v. McNally*, 59 How. (N. Y.) Pr. 500. This rule applies to a woman who alleges citizenship through the naturalization of her husband. *Belcher v. Tarren*, 26 Pac. 791. In the absence of a record of naturalization, the evidence may justify the submission of the question of naturalization to a jury. *Boyd v. Thayer*, 143 U. S. 135; 12 Sup. Ct. Rep. 375. In the absence of proof that an alien has become a citizen of the United States, his original status is presumed to continue. *Hauenstein v. Lynham*, 100 U. S. 483.

As to change of allegiance as the result of a change of the territorial sovereign, see 2 *Wharton's Int. Law Dig.* ss. 187, 188.

5. (Rules 26-29.) RENUNCIATION OF CITIZENSHIP. — The Courts of the United States, prior to 1868, generally accepted the common-law doctrine that a citizen cannot at will renounce his allegiance. 2 *Kent's Commentaries*, 49; *Inglis v. The Trustees of the Sailors' Snug Harbor*, 3 Pet. 99; *Shanks v. Dupont*, 3 Pet. 242; *The Santissima Trinidad*, 7 Wheat. 283; *Talbot v. Janson*, 3 Dall. 133; *Portier v. Le Roy*, 1 Yeates (Penn.), 371. *Contra, Alsberry v. Hawkins*, 9 Dana, 178. The executive department of the government generally maintained the opposite doctrine. 2 *Wharton's Int. Law Dig.* s. 171; *Wharton's Conf. of L.* ss. 5, 6; 8 Op. Atty.-Gen. 139; 9 Op. Atty.-Gen. 62, 356; 12 Op. Atty.-Gen. 319. And by the Act of July 27, 1868 (15 Stats. at Large, 223), Congress declared "the right of expatriation" to be "a natural and inherent right of all people," and pronounced "any declaration, instruction, opinion, order, or "decision of any officers of this government which denies, restricts, impairs, or "questions the right of expatriation" to be "inconsistent with the fundamental principles of this government." *Green v. Salas*, 31 Fed. Rep. 106, and cases cited; *Comitis v. Parkerson*, 46 Fed. Rep. 556; *In re Look Tin Sing*, 10 Sawyer C. C. 353; *Broune v. Dexter*, 66 Cal. 39. The idea of expatriation, however, comprehends not merely the loss, but the change, of home and allegiance; it includes not only emigration, but naturalization. *Black, Atty.-Gen.*, 9 Op. 356. Any law, therefore, that restricts naturalization to persons of a certain race or color, violates the declaration that expatriation "is a natural and inherent right of all people."

As to what constitutes renunciation of allegiance, the statutes of the United States are silent. It is effected by naturalization abroad. *Broune v. Dexter*, 66 Cal. 39. There must be an actual removal from the country, and the acquisition of a domicile elsewhere. *Talbot v. Janson*, 3 Dall. 133; *Comitis v. Parkerson*, 46 Fed. Rep. 556. The naturalization treaties of the United States generally provide that a naturalized citizen who renews his residence in the country of his origin, without an intention to return to the country of his adoption, shall be held to have renounced his naturalization.

6. (Rules 30, 31.) RESUMPTION OF NATIONALITY. — A citizen of the United States who acquires a foreign nationality can resume his American nationality only by one of the processes of naturalization. *Foreign Relations of the United States*, 1884, p. 451. Whether this doctrine applies to an American woman who acquires a foreign nationality by marriage, if, after the death of her husband, she returns to the United States, see *Wharton's Int. Law Dig.* s. 186;

Beck v. McGillis, 9 Barb. 35; *Pequignot v. Detroit*, 16 Fed. Rep. 211. The Act (February 10, 1855, 10 Stats. at Large, 604; Rev. Stats. s. 1994) naturalizing women by virtue of their marriage to citizens of the United States says nothing as to the effect of the marriage of an American woman to an alien. See *Foreign Relations of the United States*, 1874, p. 413; 12 Op. Atty.-Gen. 7.

For specific provisions as to the resumption of original nationality, or the renunciation of adoptive nationality, see the treaties of the United States with the following powers: Austria-Hungary, September 20, 1870, Art. 4; Baden, July 19, 1868, Art. 4; Bavaria, May 26, 1868, Art. 4; Belgium, November 16, 1868, Art. 4; Denmark, July 20, 1872, Arts. 2 and 3; Ecuador, May 6, 1872, Arts. 2 and 3; Great Britain, May 13, 1870, Arts. 2 and 3; Hesse, August 1, 1868, Art. 4; North German Union, February 22, 1868, Art. 4; Sweden and Norway, May 26, 1869, Art. 3.

7. (Rules 31-33.) ACQUISITION OR CHANGE OF NATIONALITY BY MARRIED WOMAN. — By section 1994 of the Revised Statutes (Act of February 10, 1855, 10 Stats. at Large, 604), any woman who is "married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." *Walker v. Potomac Ferry Co.* 3 McArthur, 440. As to the law prior to the Act of 1855, see *Shanks v. Dupont*, 3 Pet. 242; *Beck v. McGillis*, 9 Barb. 35; *White v. White*, 1 Met. (Ky.) 185. Under this Act marriage has all the force and effect of judicial naturalization. *Leonard v. Grant*, 6 Sawyer C. C. 603. The Act also applies to a woman married to an alien who subsequently becomes naturalized. *Kelly v. Owen*, 7 Wall. 496; *Headman v. Rose*, 63 Ga. 458; *Burton v. Burton*, 1 Keyes, 559. The phrase, "might herself be lawfully naturalized," refers to class or race, and not to the qualifications of residence, character, etc. *Leonard v. Grant*, *supra*; *Kelley v. Owen*, 7 Wall. 496. See *Burton v. Burton*, 1 Keyes, 359; *Pequignot v. Detroit*, 16 Fed. Rep. 211, 215. The statute has been held to apply to a woman who lived at a distance from her husband and never came to the United States till after his death. *Kane v. McCarthy*, 63 N. C. 299; *Headman v. Rose*, 63 Ga. 458. See *Burton v. Burton*, 1 Keyes, 359, 362, 366; *Pequignot v. Detroit*, 16 Fed. Rep. 211, 215. But it has been held that a native woman who married an alien in the United States, and lived with him there till his death, did not conversely become an alien. *Comitis v. Parkerson*, 56 Fed. Rep. 556. *Contra*, *Pequignot v. Detroit*, 16 Fed. Rep. 211. As to the right of dower of a non-resident widow, see *Pratt v. Teft*, 14 Mich. 191; *Greer v. Sankston*, 26 How. Pr. (N. Y.) 471; 6 Jones Eq. 190; *Bennett v. Harms*, 51 Wis. 251.

When an alien, who has made a declaration of intention, "dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law." Rev. Stats. s. 2168.

That a divorced woman continues to be a subject of the State of which her husband was a subject, until she changes her nationality, seems to be tacitly assumed in *Pequignot v. Detroit*, 16 Fed. Rep. 211.

8. (Rule 34.) ACQUISITION OF CITIZENSHIP BY AN INFANT. — "The children of persons who have been duly naturalized under any law of the United States, . . . being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be consid-

"ered as citizens thereof." Rev. Stats. s. 2172 (Acts of March 26, 1790, 1 Stats. at Large, 103; Jan. 29, 1795, s. 3, 1 Stats. at Large, 414; April 14, 1802, s. 4, 2 Stats. at Large, 153). For provision as to children whose parents have died after making a declaration of intention, but before naturalization, see notes, *supra*, 7 (Rules 31-33). See Rev. Stats. s. 2174, as to the naturalization of seamen, which does not in terms require them to be of age. The minor child of an alien widow becomes a citizen by the marriage of his mother with a citizen of the United States, native or naturalized. *Gumm v. Hubbard*, 97 Mo. 321; *United States v. Kellar*, 11 Biss. C. C. 314; 13 Fed. Rep. 82. Also, on the naturalization of her husband, if she marries an alien who subsequently becomes naturalized. *People v. Newell*, 38 Hun, 78. In each of the three cases last cited, the widow resided and was married in the United States. See *Foreign Relations of the United States*, 1891, pp. 496, 507.

As to the phrase "dwelling in the United States," whether it means residence at the time of naturalization or continued and permanent residence, see case of *Carl Heisinger*, *Foreign Relations of the United States*, 1890, pp. 301-304; also, 2 *Wharton's International Law Digest*, s. 184; *Campbell v. Gordon*, 6 Cranch, 176.

9. (Rule 35.) LOSS OF CITIZENSHIP BY INFANT.—A Prussian subject by birth emigrated to the United States in 1848, became naturalized in 1854, and shortly afterwards returned to Germany with his family, in which was a son born in the United States after the father's naturalization. The circumstances showing that the father had resumed his original nationality, it was held that the son, being still a minor, was, while in Germany, subject to the obligations of German citizenship; that he did not, however, lose his American nationality, but was invested with a double nationality; and that he might, on attaining his majority, at his election return to the United States and assume the nationality of his birth, or remain in Germany and retain the resumptive nationality of his father. *Steinkauler's Case*, 15 Op. Atty.-Gen. 15; 2 *Wharton's International Law Digest*, s. 184.

BOOK II.

JURISDICTION.

THE subject of Book II. is Jurisdiction.¹

The Rules contained in Book II. deal with two different matters.

The first matter is the jurisdiction, in cases which contain any foreign element,² of the High Court of Justice.

Under this head are to be considered two different though closely connected questions. The first is, what are, according to English law, the limits to the jurisdiction of the High Court in cases which contain any foreign element, or, in other words, what are the cases containing a foreign element which the High Court has, according to English law, a right to determine or adjudicate upon? The second question is, what are, as far as English Courts can decide the matter, the extra-territorial effects of the exercise of jurisdiction by the High Court?

The second matter is the jurisdiction of Foreign Courts.

Under this head again are to be considered two different though closely connected questions. The first is, what are, according to English law, the proper limits to the jurisdiction of foreign Courts; or, in other words, what are the cases which the Courts of a foreign country have, according to English law, a right to determine or adjudicate upon? The second question is, under what circumstances, and how far, the High Court will give effect in England to the exercise of jurisdiction by the Courts of a foreign country in the form either of judgments or otherwise; or, in other words, what is the effect in England of foreign judgments, or of foreign proceedings, such as sentences of divorce, or adjudications of bankruptcy, which resemble judgments?

Hence Book II. is divided into two Parts.

Jurisdiction of High Court. — Part I.³ deals with the jurisdiction of the High Court. The Rules contained therein define the limits within which, in cases containing any foreign element,

¹ See Intro., pp. 2, 3, 38-56, *ante*.

² See Intro., pp. 1, 2, *ante*.

³ Chaps. iv. to x.

the High Court can exercise jurisdiction;¹ they also define the extra-territorial effect, so far as it depends on English law, of the exercise of jurisdiction by the High Court.²

The word "jurisdiction" is throughout this Digest used as meaning "the right or authority of a Court;" the word is not therein used as meaning "the area over which a Court has jurisdiction," *i. e.*, over which it has authority to enforce its judgments. This matter deserves attention, since the term "jurisdiction" is more often than not used in English text-books, judgments, and statutes as meaning the "area of territory over which a Court has jurisdiction."³

Jurisdiction of Foreign Courts.—Part II.⁴ deals with the jurisdiction of Foreign Courts.

The Rules contained therein define the cases in which (according to the principles recognised by English law) the Courts of a foreign country have a right to exercise jurisdiction,⁵ *i. e.*, are Courts of competent jurisdiction.⁶

The Rules contained in Part II. also define the effect in England of the exercise of jurisdiction by foreign Courts.⁷

Inquiries, however, as to the jurisdiction properly exercisable by the Courts of a foreign country and its effect in England always, or nearly always, come before English judges in the form of inquiries as to the effect to be given in England to a foreign judg-

¹ See chaps. i. to ix.

² See chap. x.

³ This is the case, for instance, in the R. S. C. 1883, Ord. XI. r. 1. This rule is in substance embodied in the Exceptions to Rule 46, *post*, but in these Exceptions for the word "jurisdiction" is substituted "England," *e. g.*, for the words "land situate within the jurisdiction" is substituted "land situate in England."

For a contrast between the two meanings of the word "jurisdiction," compare *In re Smith*, 1876, 1 P. D. 300, 301, judgment of Sir R. Phillimore; *The Vivar*, 1876, 2 P. D. (C. A.) 29, 32; *Cookney v. Anderson*, 1862, 31 Beav. 452, 462, judgment of Romilly, M. R.; *Tassell v. Hallen*, [1892] 1 Q. B. 321, 323, judgment of Coleridge, C. J.

⁴ Chaps. xi. to xvii.

⁵ See chaps. xi. to xv.

⁶ See as to Courts of competent jurisdiction, Intro., pp. 38, 39, *ante*, and Rule 76, *post*. The Courts, be it noted, of countries other than England, which form part of the British dominions are, for most purposes, to be considered "foreign" Courts, and our judges, in fixing the limits of the jurisdiction properly exercisable, *e. g.*, by a Victorian Court, will, in general, deal with the matter exactly as they would if Victoria were a foreign country in the ordinary sense of the term. As to meaning of "foreign," see p. 68, *ante*, and as to meaning of "British dominions," see p. 65, *ante*.

⁷ See chaps. xvi. and xvii.

ment, or to some proceeding such as an adjudication in bankruptcy which partakes to a certain extent of the nature of a judgment. If we for the moment, therefore, give a wide sense to the term "foreign judgment," it may be laid down with substantial accuracy that Part II. treats of Foreign Judgments.

PART I.

JURISDICTION OF THE HIGH COURT.

CHAPTER IV.

GENERAL RULES AS TO JURISDICTION.

(A) WHERE JURISDICTION DOES NOT EXIST.

(i) *In Respect of Persons.*

RULE 38.—The Court has (subject to the exceptions hereinafter mentioned) no jurisdiction¹ to entertain an action² or other proceeding against —

- (1) any foreign sovereign ;³
- (2) any ambassador or other diplomatic agent⁴ representing a foreign sovereign and accredited to the Crown ;⁵

¹ To the persons enumerated in this Rule might, from one point of view, be rightly added the Crown itself, since an *action* cannot be brought against the Crown, nor can an action *in rem* be brought against any ship of the Royal Navy. But the Crown is purposely omitted because proceedings can in effect be under certain circumstances brought in the High Court against the Crown in the form of a petition of right (see especially, *Clode, Petition of Right*, 66, 67 ; *Com. Dig.*, “Action,” cap. 1 ; and (among other cases) *Canterbury v. Attorney-General*, 1843, 1 Phillips, 306, 322 ; *Thomas v. The Queen*, 1874, L. R. 10 Q. B. 31 ; *Rustomjee v. The Queen*, 1876, 1 Q. B. D. 487 ; 2 Q. B. D. (C. A.) 69 ; *Windsor & Annapolis Ry. Co. v. The Queen*, 1886, 11 App. Cas. 607 ; *Tobin v. The Queen*, 1864, 16 C. B. (N. S.) 310 ; 33 L. J. C. P. 199), and this work is not concerned with the technical rules which merely govern the practice of the High Court.

² The word “action” has in these Rules the meaning given it by the Judicature Act, 1873 (36 & 37 Vict. cap. 66), s. 100, taken together with R. S. C. 1883, Ord. I. r. 1.

³ *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149.

⁴ See *Hall, International Law*, 3rd ed., p. 168.

⁵ *Parkinson v. Potter*, 1885, 16 Q. B. D. 152 ; *Taylor v. Best*, 1854, 14 C. B. 487 ; 23 L. J. C. P. 89 ; *Magdalena &c. Co. v. Martin*, 1859, 2 E. & E. 94 ; *Munirus Bey v. Gadban*, [1894] 1 Q. B. 533 ; [1894] 2 Q. B. (C. A.) 352.

- (3) any person belonging to the suite of such ambassador or diplomatic agent.¹

An action or proceeding against the property of any of the persons enumerated in this Rule is, for the purpose of this Rule, an action or proceeding against such person.²

Comment.

(1) *Foreign sovereign*.—No action or other proceeding can be taken in the Courts of this country against a foreign sovereign,³ nor can the property of a foreign sovereign be seized or arrested.⁴

(2) *An ambassador, etc.*—An ambassador or other diplomatic agent accredited to the Crown by a foreign state cannot, at any rate without his consent,⁵ be made defendant here in an action either for breach of contract or, it would seem, for tort, nor can his property be seized.⁶

The Court, however (semble), has jurisdiction over an ambassador or diplomatic agent of a foreign sovereign who is not accredited to the Crown, but is in England.⁷

(3) *Members of suite, etc.*—The privilege of the ambassador or diplomatic agent extends to “all persons associated in the performance of the duties of an embassy or legation. . . . And if it “be once ascertained that the person was treated at the embassy

¹ *Fisher v. Begrez*, 1832, 2 L. J. Ex. 13; *Nelson*, 401; *Novello v. Toogood*, 1823, 1 B. & C. 554, 562; *Macartney v. Garbutt*, 1890, 24 Q. B. D. 368; *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533; [1894] 2 Q. B. (C. A.) 352.

² *The Parlement Belge*, 1880, 5 P. D. (C. A.) 197.

³ *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149; *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533. Compare *Duke of Brunswick v. King of Hanover*, 1844, 6 Beav. 1; 1848, 2 H. L. C. 1; *Wadsworth v. Queen of Spain*, 1851, 17 Q. B. 171; 20 L. J. Q. B. 488; *Munden v. Duke of Brunswick*, 1847, 10 Q. B. 656; 16 L. J. Q. B. 300.

⁴ *The Parlement Belge*, 1880, 5 P. D. (C. A.) 197. Whether the privilege of a sovereign, not to be sued for acts done in his private capacity whilst a sovereign, continues after he has ceased, *e. g.*, by abdication, to be a sovereign? Compare *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149, 153, judgment of *Wills, J.*, and *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533.

⁵ Compare Exception 1, p. 212, *post*.

⁶ Compare *Taylor v. Best*, 1854, 14 C. B. 487, 521, 522, judgment of *Jarvis, C. J.*, and 423–425, judgment of *Maule, J.*, with *Magdalena Co. v. Martin*, 1859, 2 E. & E. 94, 113, 114, judgment of Court commenting upon *Taylor v. Best*.

⁷ But see an opposite opinion expressed, *Nelson*, p. 403, and compare *New Chile Co. v. Blanco*, 1888, 4 Times L. R. 346. This case only decides that as a matter of discretion the Court will not allow service of a writ out of England on the representative of a foreign state accredited to a foreign state.

“or legation as a member of the same, and employed from time to time in the work of the legation, the Court will not curiously measure the quantum of the services either required from or rendered by him. But the service must be *bonâ fide*.”¹

Thus a *chargé d'affaires*,² a secretary,³ or a chorister *bonâ fide* employed in the chapel of an embassy,⁴ is privileged. But the privilege is that of the ambassador or diplomatic agent.⁵

Illustrations.

1. *X* is a foreign sovereign. *X* while on a visit to England incurs debts. The Court has no jurisdiction to entertain an action for the debts.⁶

2. *X* is a foreign sovereign. He is living in England *incognito* under the name of *Y*. Whilst in England, and passing as a British subject, he makes a promise of marriage to *A*, an Englishwoman, who has no knowledge that *X* is a foreign sovereign. *X* breaks his promise of marriage. *A* brings an action against *X*, who pleads that he is a sovereign. The Court has no jurisdiction to entertain the action.⁷

3. An unarmed packet-boat belonging to the King of Belgium, and in the hands of officers employed by him, carries the mails from Belgium to England. The ship also carries merchandise. She negligently runs down an English boat in Dover Harbour. The Court has no jurisdiction to entertain an action against the ship, or to give any redress whatever.⁸

4. *X* is the ambassador accredited to the Crown by a foreign state. *X* is indebted to an English company for a call due on shares. The Court has no jurisdiction to entertain an action for the amount of the call.⁹

5. *X* is a British subject. He is accredited to the Crown as

¹ *Nelson*, p. 400. See *Parkinson v. Potter*, 1885, 16 Q. B. D. 152.

² *Taylor v. Best*, 1854, 14 C. B. 487.

³ *Hopkins v. De Robeck*, 1789, 3 T. R. 79.

⁴ *Fisher v. Begrez*, 1832, 2 L. J. Ex. 13.

⁵ Compare *Hall*, 4th ed., pp. 178–192.

⁶ See *Duke of Brunswick v. King of Hanover*, 1848, 2 H. L. C. 1; *Wadsworth v. Queen of Spain*, 1851, 17 Q. B. 171; 20 L. J. Q. B. 488. Compare *Munden v. Duke of Brunswick*, 1847, 10 Q. B. 656; 16 L. J. Q. B. 300.

⁷ *Mighell v. The Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149.

⁸ *The Parlement Belge*, 1880, 5 P. D. (C. A.) 197. See *The Constitution*, 1879, 4 P. D. 39. These cases apparently overrule *The Charkieh*, 1873, L. R. 4 A. & E. 59, 120.

⁹ *Magdalena Co. v. Martin*, 1859, 2 E. & E. 94; 28 L. J. Q. B. 310; *Taylor v. Best*, 1854, 14 C. B. 487; 23 L. J. C. P. 89.

Secretary to the Chinese Embassy. His household furniture in London cannot be seized for the non-payment of parochial rates.¹

6. *X* is ambassador from the King of Italy to the French Republic. He visits England and incurs debts here, for which an action is brought. Semble, the Court has jurisdiction.²

Exception 1. — The Court has jurisdiction to entertain an action against a foreign sovereign or (semble) an ambassador, diplomatic agent, or other person coming within the terms of Rule 38 (2) and (3), if such foreign sovereign, ambassador, or other person, having appeared before the Court voluntarily, waives his privilege and submits to the jurisdiction of the Court.³

Comment.

A foreign sovereign can submit to the jurisdiction of the Court.

"Suppose," asks Maule, J., "a foreign sovereign in this country were desirous to have some question decided by the Courts of this Kingdom, could he not do so?"⁴ This question must clearly be answered in the affirmative.

This submission must be an unmistakable election to submit to the Court's jurisdiction, and must take place at the time when the Court is about, or is being asked, to exercise jurisdiction over him.⁵

The principles applicable to submission by a sovereign to the jurisdiction of the Court probably apply to the like submission by an ambassador,⁶ or other diplomatic agent accredited to the Crown.

¹ *Macartney v. Garbutt*, 1890, 24 Q. B. D. 368.

² When in this Digest, or in any Illustration, it is stated that the Court "has jurisdiction" or "has no jurisdiction," what is meant is that the Court has jurisdiction or has no jurisdiction (as the case may be) in respect of the matter (*e. g.*, to entertain an action) to which the particular Rule, Exception, or Illustration refers.

³ See *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149, 157, 160, judgments of *Esher*, M. R., and of *Lopes*, L. J.; *Parkinson v. Potter*, 1885, 16 Q. B. D. 152. But conf. *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533, judgment of *Wright*, J. This, of course, is an application of Rule 42, *post*, but is more conveniently treated of with special reference to Rule 38.

⁴ *Taylor v. Best*, 1854, 23 L. J. C. P. 89, 93, per *Maule*, J.

⁵ *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149, 159, judgment of *Esher*, M. R. Compare *Hall*, 4th ed., p. 181, n. 1.

⁶ It may, however, be argued that an action can under no circumstances be maintained in England against an ambassador, etc.; for the Diplomatic Privileges Act, 1708, 7 Anne, cap. 12, "prohibits and makes null and void the issue of any writ or process against an ambassador, and not merely writs or processes in the nature of writs of execution." *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533, 542, per *Curiam*, compared with *Magdalena Steam Co. v. Martin*, 1859, 2 E. & E. 94; 28 L. J. Q. B. 310. The suggested argument is incon-

Question. — *Has the Court jurisdiction to entertain a counter-claim against a foreign sovereign or an ambassador?*

The answer to this inquiry is open to doubt. A sovereign or ambassador who brings an action in the High Court undoubtedly submits himself to its jurisdiction in regard to that action.¹ But does he submit himself to its jurisdiction any further than this? On the whole, in the absence of authority, the right answer is (it is submitted) that he submits himself to the jurisdiction of the Court in regard to that action, but no further. This principle decides the extent to which the Court has jurisdiction to entertain a counter-claim against, *e. g.*, an ambassador who is plaintiff in an action. If the counter-claim is really a defence to the action, *i. e.*, is a set-off, or something in the nature of a set-off, the Court has a right to entertain it. If the counter-claim is really a cross-action, the Court has (semble) no jurisdiction to entertain it.

Illustrations.

1. *X* is a foreign sovereign. Whilst living *incognito* in England under the name of *Y*, he incurs debts to *A*, who brings an action against *X* under his proper name and description. *X* accepts service of the writ, and defends the action on its merits. In the course of the evidence it is shown that *X* is a foreign sovereign. The Court has jurisdiction.²

2. *X* is an ambassador accredited by the Czar to the Crown. *A* brings an action against *X* for an alleged debt of £100. *X* accepts service, does not raise the defence that the Court has no

sistent with *Taylor v. Best*, 1854, 14 C. B. 487. (Compare especially, *Ibid.*, 522, 523, judgment of *Jervis*, C. J.) But it is strengthened by the language of the Court in *Musurus Bey v. Gadban*, [1894] 2 Q. B. (C. A.) 352, 357, judgment of *A. L. Smith*, L. J., and 360-362, judgment of *Davey*, L. J.

The Statute of Limitations does not run against a diplomatic agent who contracts a debt in England during his tenure of office, nor (semble) for a reasonable time after the end of such tenure. *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533; [1894] 2 Q. B. (C. A.) 352.

¹ "I was certainly impressed by [the] remark that this was in effect a "cross-action, and I think that the point would require very much consideration before it was decided that a person bringing an action in this country "had not by so doing made himself amenable to the jurisdiction with respect "to matters connected with that action." *Yorkshire Tannery v. Eglinton Chemical Co.* 1884, 54 L. J. Ch. 81, 83, judgment of *Pearson*, J. This language, however, is used in a case which has no reference to the position of a sovereign or an ambassador.

² Compare *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149, 159, judgment of *Esher*, M. R. See, however, *Imperial Japanese Government v. P. & O. Co.* [1895] A. C. 644.

jurisdiction, and defends the case on the merits. Semble, the Court has jurisdiction (?).¹

3. *A* is the minister of the French Republic accredited to the Crown. *A* brings an action against *X* for a debt of £100. *X*, in his counter-claim, claims £100 due to him as debt or damages from *A*. The Court (semble) has jurisdiction to entertain the counter-claim.

4. The circumstances are the same as in Illustration No. 2, except that *X*'s counter-claim is a claim for damages against *A* in respect of a libel by *A* upon *X*. The Court (semble) has no jurisdiction to entertain the counter-claim.

Exception 2. — The Court has jurisdiction to entertain an action against a person belonging to the suite of an ambassador or diplomatic agent, if such person engages in trade (?).

Comment.

Under the Diplomatic Privileges Act, 1708, 7 Anne, cap. 12, s. 5, it is provided that "no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or public minister, shall have or take any benefit by this Act;" and apparently the result is that the privilege of exemption from being sued, which is possessed by the servant of an ambassador, is lost by the circumstance of trading.²

(ii) *In Respect of Subject-Matter.*

RULE 39. — Subject to the exception hereinafter mentioned, the Court has no jurisdiction to entertain an action for

- (1) the determination of the title to, or the right to the possession of, any immovable situate out of England (foreign land³), or

¹ See note 6, p. 212, *ante*.

² Compare *Hall*, 4th ed., p. 185.

³ *Mostyn v. Fabrigas*, 1774, Cowp. 161; *In re Hawthorne*, 1883, 23 Ch. D. 743; *Companhia de Mocambique v. British S. Africa Co.* [1892] 2 Q. B. (C. A.) 358 (especially p. 413, judgment of *Fry*, L. J.); *Boyse v. Colclough*, 1854, 1 K. & J. 124; *Pike v. Hoare*, 1763, 2 Eden, 182.

See, on the whole subject of actions in respect of foreign land, *Story*, ss. 554, 555; *Foote*, 2nd ed., pp. 158, 179; *Penn v. Baltimore*, 1750, 1 Ves. 444, 2 Wh. & Tu., 2nd ed., 767; *Mostyn v. Fabrigas*, 1774, 1 Sm. L. Cas., 9th ed., 628.

- (2) the recovery of damages for trespass to such immovable.¹

Comment.

This Rule is now well established, and, whatever be its historical origin, — a matter still open to discussion, — is on the whole in conformity with that “principle of effectiveness” which, as already explained,² forbids a Court to give judgments which it cannot render effective, or which it can render effective only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign Court.

As to clause 1. — The principle of effectiveness amply justifies, even though it may not historically account for, the refusal of English judges to adjudicate upon the title to, or the right to the possession of, foreign land.

As to clause 2. — Respect for the principle of effectiveness does not, it may be said, require or justify the refusal on the part of English judges to entertain actions for such injuries to foreign land as admit of compensation in damages. This remark, however, is more plausible than sound. It is impossible to keep an action for trespass to land free from questions as to the title to the land; and injustice³ would often ensue were our Courts to give damages for trespass to land in cases in which they could not deal with the right to the ownership or the possession of the land. The refusal, therefore, to entertain any action whatever with regard to foreign land is, whatever its origin, a legitimate application or extension of the principle of effectiveness.

Illustrations.

1. *A* brings an action to obtain possession of lands in Canada. The Court has no jurisdiction.⁴

2. The title to a house at Dresden is in dispute between *X* and *A*. *X* sells the house, receives part of the purchase-money, and takes a mortgage for the balance. *X* and *A* are both in England.

¹ *British S. Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602; *Doulson v. Matthews*, 1792, 4 T. R. 503; 2 R. R. 448.

² See Intro., General Principle No. III., p. 38, *ante*.

³ Compare *British S. Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602, 625, judgment of *Herschell*, Ch.

⁴ *Doulson v. Matthews*, 1792, 4 T. R. 503; 2 R. R. 448; *Roberdeau v. Rouse*, 1738, 1 Atk. 543.

A brings an action against *X* to make him account for the purchase-money. The Court has no jurisdiction.¹

3. Action by *A*, a foreigner, against *X*, a foreigner, and against *Y & Co.*, an English company formed for working a Russian mine, to restrain the English company from paying to *X* part of the profits of the mine which *A* claims by way of commission. The Court has no jurisdiction.²

4. Action by *A & Co.*, a Portuguese company, against *X & Co.*, an English company, for trespass to *A & Co.*'s land in South Africa. The Court has no jurisdiction.³

5. *A* files a bill for discovery to obtain inspection of documents in *X*'s possession in England in aid of proceedings about to be taken for recovery of land in India. The Court has no jurisdiction.⁴

*Exception.*⁵ — The Court has jurisdiction to entertain an action against a person who is in England⁶ respecting an immovable situate out of England (foreign land), on the ground of either —

(a) a contract between the parties to the action, or

(b) an equity between such parties⁷

with reference to such immovable.

¹ *In re Hawthorne*, 1883, 23 Ch. D. 743. Conf. *White v. Hall*, 1806, 12 Ves. 321.

² *Matthaei v. Galitzin*, 1874, L. R. 18 Eq. 340.

"A foreigner resident abroad cannot bring another foreigner into this Court respecting property with which this Court has nothing to do. This Court is not to be made a vehicle for settling disputes arising between parties resident abroad." *Ibid.*, pp. 348, 349, per *Malins*, V. C. Semble, the real reason is the fact of the property being abroad. *A*, an alien, may certainly sue *X*, an alien, in England for breach of contract. Compare *Blake v. Blake*, 1870, 18 W. R. 944; *Cookney v. Anderson*, 1862, 31 Beav. 452. See also, *Whitaker v. Forbes*, 1875, 1 C. P. D. (C. A.) 51. But contrast *Buenos Ayres Co. v. Northern Ry. Co.* 1877, 2 Q. B. D. 210.

³ *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602.

⁴ *Reiner v. Marquis of Salisbury*, 1876, 2 Ch. D. 378.

"You cannot, in my opinion, maintain a suit in this country for the recovery of land in the colonies or a foreign country. If, then, this bill is for discovery in aid of a suit which cannot be maintained in this Court, that is, if the plaintiff does not show a title to sue, he shows no title to discovery." *Ibid.*, p. 385, judgment of *Malins*, V. C. See also, *Norton v. Florence Land &c. Co.* 1877, 7 Ch. D. 332; *Moor v. Anglo-Italian Bank*, 1879, 10 Ch. D. 681.

⁵ See, as to this anomalous exercise of jurisdiction, *Westlake*, 3rd ed., pp. 194–197, ss. 172–174; *Foote*, chap. vi., pp. 158–174; and for its application to an administration action, see *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34; *Ewing v. Orr Ewing*, 1885, 10 App. Cas. 453.

⁶ But see *Jenney v. Mackintosh*, 1886, 33 Ch. D. 595.

⁷ As to what may constitute an equity, compare illustrations, pp. 218, 219, *post*, and contrast *Hicks v. Powell*, 1869, L. R. 4 Ch. 741, and *Harrison v. Har-*

Comment.

The principle on which this exception, derived from the practice of the Court of Chancery, rests, is that though the Court has no jurisdiction to determine rights over foreign land, yet, when *from a person's presence in England* the Court has jurisdiction over him, the Court will compel him to dispose of, or otherwise deal with, his interest in foreign land so as to give effect to obligations which he has incurred with regard to the land. The obligations which the Court will thus enforce are not easily brought under any one definite head. Westlake describes them as obligations relating to immovables which arise from, or as from, a person's own contract or tort.¹ Foote states that "the English Courts, acting *in personam* and not *in rem*, will make decrees, upon the ground of a contract or other equity subsisting between the parties, respecting property situated out of the jurisdiction,"² *i. e.*, out of England.

This anomalous jurisdiction, it has been judicially laid down, "is grounded, like all other jurisdiction of the Court [of Chancery], not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the Court. If the Court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad; — if, for instance, as in *Penn v. Lord Baltimore*,³ it can decree the performance of an agreement touching the boundary of a province in North America, or, as in the case of *Toller v. Carteret*,⁴ can foreclose a mortgage in the Isle of Sark, . . . in precisely the like manner it can restrain the party being within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the instituting or prosecution of an action in a foreign Court."⁵

risson, 1873, L. R. 8 Ch. 342. As to equitable interests in foreign land, and how far trusts can be engrafted upon foreign land, see *Lewin on Trusts*, 8th ed., chap. iv., paras. 4-6, pp. 48-50.

¹ See *Westlake*, 3rd ed., p. 194. Compare *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34, 40, language of *Selborne*, Ch.

² See *Foote*, 2nd ed., 160.

³ 1 Ves. Sen. 444.

⁴ 2 Vern. 494.

⁵ *Lord Portarlington v. Soulby*, 1834, 3 My. & K. 104, 106, judgment of *Brougham*, Ch.

"The Courts of Equity in England are, and always have been, Courts of conscience, operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction."¹

This indefinite jurisdiction is exceptional,² and is (substantially) confined to cases in which there is either a contract between the parties, or something of the nature of a trust.³

The Court, further, will not make a decree which runs contrary to the law of the country where the land affected is situate. "If, indeed, the law of the country where the land is situate should not permit, or not enable, the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment, the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities."⁴

Illustrations.

1. *X*, who is in England, has executed articles of agreement with *A* in England with reference to land in Canada. *A* brings an action against *X* for specific performance. The Court has jurisdiction.⁵

2. *A* is the owner of an estate in St. Christopher, West Indies. *X*, a creditor of *A*'s, by unfair use of process in local Courts,

¹ *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34, 40, per Selborne, Ch.

² See for example, *In re Hawthorne*, 1883, 23 Ch. D. 743; *Mathaei v. Galitzin*, 1874, L. R. 18 Eq. 340; *Norton v. Florence Land Co.* 1877, 7 Ch. D. 332.

³ *Kildare v. Eustace*, 1686, 1 Vern. 419; and see illustrations, *post*. "As to lands lying in a foreign country, the Court will enforce *natural equities*, and compel the specific performance of *contracts*, provided the *parties* be within the jurisdiction, and there be no insuperable obstacle to the execution of the decree." *Lewin, Law of Trusts*, 8th ed., p. 48.

⁴ *Ex parte Pollard*, 1840, Mont. & Ch. 239, 250; 4 Deacon, 27; *Westlake*, 3rd ed., p. 194, s. 172.

⁵ See *Penn v. Baltimore*, 1750, 1 Ves. Sen. 444; *Tulloch v. Hartley*, 1841, 1 Beav. 114.

causes *A*'s estate to be sold, and purchases it. *X* is in England. The Court has jurisdiction to decree reconveyance of estate.¹

3. A decree is made in the Court directing an inquiry to ascertain the amount of the mortgage debt due on lands in a West Indian Island in proceedings for redemption, all parties being in this country. The Court has jurisdiction to grant injunction restraining mortgagee of estate from proceeding on a bill of foreclosure in the colonial Court.²

4. *A*, residing in England, brings an action against *X* and *Y*, also residing in England, to enforce a lien on land in Prussia. Semble, that, if *A* can show special circumstances arising out of the dealings between the parties, the Court may have jurisdiction to entertain the action.³

5. *X* mortgages land in one of the colonies to *A*. *X* is in England. The Court has jurisdiction to make a foreclosure decree against *X*.⁴

6. The Court has jurisdiction to take accounts between *A* and *X*, tenants of foreign land. *A* and *X* are in England.⁵

7. *A* brings an action against *X*, *Y*, and *Z* to enforce against real estate in Trinidad the trusts of a creditor's deed. *X*, *Y*, and *Z* are the persons in whom the legal estate is outstanding. *X* and *Y* reside in England. The Court has jurisdiction to entertain the action against *X* and *Y*⁶ [and *Z*, who resides in Trinidad, may be served with a writ there, and added as a defendant in the action⁷].

8. *A* brings an action against *X*, who is in England, to be relieved of a charge on *A*'s land in Ireland, which charge has been obtained by fraud. Semble, the Court has jurisdiction.⁸

¹ *Cranston v. Johnston*, 1796, 3 Ves. 170; 1800, 5 Ves. 277. See *Mercantile Investment &c. Co. v. River Plate Co.* [1892] 2 Ch. 303. But contrast *White v. Hall*, 1806, 12 Ves. 321. See *Jackson v. Petrie*, 1804, 10 Ves. 164.

² *Beckford v. Kemble*, 1822, 1 S. & St. 7. See *Booth v. Leycester*, 1837, 1 Keen, 579; *Bunbury v. Bunbury*, 1839, 1 Beav. 318.

³ *Norris v. Chambres*, 1861, 3 De G. F. & J. 583; 30 L. J. Ch. 285. Conf. *Harrison v. Harrison*, 1873, L. R. 8 Ch. 342.

⁴ *Paget v. Ede*, 1874, L. R. 18 Eq. 118. Compare *Westlake*, 3rd ed., 196, 197. See *Beckford v. Kemble*, 1822, 1 S. & St. 7.

⁵ *Scott v. Nesbitt*, 1808, 14 Ves. 438. Compare *Carteret v. Petty*, 1676, 2 Swanst. 323 (n.), where the defendant was out of England.

⁶ *Jenney v. Mackintosh*, 1886, 33 Ch. D. 595.

⁷ Under R. S. C. 1883, Ord. XI. r. 1 (g). See Exception 7 to Rule 46, *post*.

⁸ *Arglasse v. Muschamp*, 1682, 1 Vern. 75. See *Kildare v. Eustace*, 1686, 1 Vern. 419; *Angus v. Angus*, 1737, West. 23; *Clarke v. Ormonde*, 1821, Jacob, 108. Conf. *Beckford v. Kemble*, 1822, 1 S. & St. 7; *Bunbury v. Bunbury*, 1839, 1 Beav. 318; *Tulloch v. Hartley*, 1841, 1 Y. & Coll. 114.

RULE 40.¹ — The Court has no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal law of a foreign country.

Comment.

“The common law considers crimes as altogether local, and cognisable and punishable exclusively in the country where they are committed. . . . The same doctrine has been frequently recognised in America. . . . Chief Justice Marshall, in delivering the opinion of the Supreme Court, said : ‘The Courts of no country execute the penal laws of another.’”²

“The rule that the Courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment.”³

Hence the High Court cannot entertain either an action for the recovery of a penalty due under the law of a foreign country, or an action on a foreign judgment for such penalty.⁴

Question.— *What is a penal law?* The application of Rule 40 raises the difficult question, when is a law to be considered a penal law? or, what is really the same inquiry under another form, when is an action to be considered a penal action?

These inquiries are to be answered as follows: A “penal law” is strictly and properly a law which imposes punishment for an offence against the state; and a “penal action” is a proceeding for

¹ *Story*, ss. 620–622; *Piggott*, 2nd ed., p. 209; *Folliott v. Ogden*, 1789, 1 H. Bl. 123; 2 R. R. 736; *Huntington v. Attrill*, [1893] A. C. 150; *Wisconsin v. Pelican Co.* 1888, 127 U. S. 265; *Huntington v. Attrill*, 1892, 146 U. S. 657. Compare Intro., p. 35, *ante*, and Rule 122, *post*.

² See *Story*, ss. 620, 621, citing *The Antelope*, 10 Wheat. 66, 123. And compare *Folliott v. Ogden*, 1789, 1 H. Bl. 123; 2 R. R. 736; *Ogden v. Folliott*, 1790, 3 T. R. 726; *Rafael v. Verelst*, 1775, 2 W. Bl. 983.

³ *Wisconsin v. Pelican Co.* 1888, 127 U. S. 265, 290, *per Curiam*. The passage is cited with approval not only by the Supreme Court in *Huntington v. Attrill*, 1892, 146 U. S. 657, 671, but also by the Privy Council in *Huntington v. Attrill*, [1893] A. C. 150, 157.

⁴ As to Effect of Foreign Judgments, see chap. xvi., *post*, and especially Exception to Rule 93, *post*.

the recovery, in favour of the state, of a penalty due under a penal law.¹ A law, on the other hand, is not a penal law merely because it imposes an extraordinary liability on a wrong-doer, in favour of the person wronged, which is not limited to the damages suffered by him ; and an action for enforcing such liability, by the recovery of the penalty due to the person wronged, is not a penal action : the essential characteristic, in short, of a penal action is that it should be an action on behalf of the government or the community, and not an action for remedying a wrong done to an individual.² A proceeding, then, in order to come within Rule 40, must be in the nature of a suit in favour of the state whose law has been infringed.

Illustrations.

1. *X* incurs a penalty of £100 for the infringement of the law of a foreign country prohibiting the sale of spirits. The penalty is recoverable in the Courts of the foreign country in an action for debt brought by an official of the foreign government. *X* is in England. The proper official brings an action in the High Court for the recovery of the £100. The Court has no jurisdiction.³

2. The circumstances are the same as in Illustration 1, except that the penalty is recoverable under the law of the foreign country by an informer, and *A*, the informer, brings an action for the recovery of the £100 due from *X*. The Court has no jurisdiction.⁴

3. Under the law of an American State, *X*, the treasurer of an insurance company in the State, incurs a penalty, amounting in English money to £100, for not making certain returns in respect of the business of the company. The penalty is, under the law of the State, recoverable by a State official. Half the penalty, when recovered, is to be paid by him into the State treasury, and half is to be retained for himself. *A*, the State official, obtains judgment against *X* in the Court of the American State for the £100.

¹ *Huntington v. Attrill*, 1892, 146 U. S. 657, 667, opinion of Supreme Court ; *Huntington v. Attrill*, [1893] A. C. 150, 156, 157, judgment of Privy Council.

² *Ibid.*

³ Compare *Huntington v. Attrill*, [1893] A. C. 150.

⁴ Semble, that this is so even though the penalty goes wholly to the informer ; for the object of the action is not to remedy a wrong done to the plaintiff, but to punish the defendant for violating the law of the foreign state. Compare *Robinson v. Currey*, 1881, 7 Q. B. D. (C. A.) 465, and *Saunders v. Wiel*, [1892] 2 Q. B. (C. A.) 321. See *Wisconsin v. Pelican Co.* 1838, 127 U. S. 265.

X is in England. *A* brings an action on the judgment against *X*. The Court has no jurisdiction.¹

4. Under the law of New York, the director of a trading corporation, who signs certain certificates with regard to the affairs of the corporation knowing such certificates to be false, becomes liable for the debts of the corporation. Under this law, *X*, a director of a New York company, becomes liable to *A*, a creditor for a debt due from the company. *X* is in England. *A* brings an action against *X* for the debt. Semble, the Court is not, under Rule 40, deprived of jurisdiction.²

5. The circumstances are the same as in Illustration 4, except that *A* has recovered judgment in the Court of New York for the penalty, and brings an action against *X* in England on the judgment. Semble, the Court is not, under Rule 40, deprived of jurisdiction.³

(B) WHERE JURISDICTION EXISTS.

(i) *In Respect of Persons.*

RULE 41.⁴—Subject to Rule 38, and to the exception hereinafter mentioned, no class of persons is, as such, excluded or exempt from the jurisdiction of the Court, *i. e.*, any person may be a party to an action or other legal proceeding in the Court.

Comment.

The High Court, subject to the very slight limitations referred to in our Rule, is open to persons of every description. No one is, on account of his mere position or status, precluded from being plaintiff in an action, or from taking legal proceedings in the Court. Nor, again, is any one, on account of his mere position or status, exempt from the liability to be made defendant in an action, or, speaking generally, to have legal proceedings taken

¹ See *Wisconsin v. Pelican Co.* 1888, 127 U. S. 365.

² *Huntington v. Attrill*, [1893] A. C. 150. It is, of course, possible that the jurisdiction of the Court may be excluded under some other Rule in this Digest.

³ *Ibid.*

⁴ Compare *Dicey, Parties to an Action*, pp. 1-4; *Phillips v. Eyre*, 1870, L. R. 6 Q. B. 1, 28, judgment of Court delivered by *Willes, J.* Compare especially, Illustrations to Rule 45, *post*.

against him in the High Court. In this matter, a British subject and an alien,¹ a natural person and a corporation,² an infant, a married woman, a peer, and (subject, of course, to the effect of Rule 38) a foreign sovereign,³ stand in exactly the same position. No foreigner is, as such, required even to give security for costs.⁴

Exception. — The Court has no jurisdiction during the continuance of war to entertain an action brought by an alien enemy, unless he is living here under the license or protection of the Crown.⁵

The term "alien enemy" includes any British subject or citizen of a neutral state voluntarily residing during a war with Great Britain in a hostile country.⁶

RULE 42.⁷ — The Court has jurisdiction in any kind of action⁸ over any person who has by his conduct precluded himself from objecting to the jurisdiction of the Court.

¹ *De la Vega v. Vianna*, 1830, 1 B. & Ad. 284; *Melan v. Duke de Fitzjames*, 1797, 1 B. & P. 138; *Worms v. De Valdor*, 1880, 49 L. J. Ch. 261.

² *Magdalena Co. v. Martin*, 1859, 2 E. & E. 94; *Carron Co. v. Maclaren*, 1855, 5 H. L. C. 416; *Westman v. Aktiebolaget &c.* 1876, 1 Ex. D. 237.

³ *Emperor of Austria v. Day*, 1861, 30 L. J. Ch. 690; 3 De G. F. & J. 217; *United States v. Prioleau*, 1865, 2 H. & M. 559; *Republic of Peru v. Dreyfus*, 1888, 38 Ch. D. 348.

⁴ The Court can, it is true, in its discretion compel a plaintiff, who is permanently residing out of England, to give security for costs, but this can be done in the case of a British subject no less than in that of an alien.

⁵ *Wells v. Williams*, 1697, 1 Salk. 46; *Le Bret v. Papillon*, 1804, 4 East, 502; 7 R. R. 618; *Alcinous v. Nigreu*, 1854, 4 E. & B. 217; 24 L. J. Q. B. 19; *Antoine v. Morshead*, 1815, 6 Taunt. 237; *Daubuz v. Morshead*, 1815, 6 Taunt. 332.

⁶ See, as to disabilities of an alien enemy, *Dicey, Parties to Action*, pp. 3, 4.

It may be suggested that to this exception should be added another, viz., that the Court has no jurisdiction to entertain an action brought by the Crown. But, though the Crown cannot bring an action, the Crown can take proceedings in the High Court by information, etc., *e. g.*, for recovery of debts; and with the technical rules as to practice, except in so far as they determine the jurisdiction of the Court, this Digest is not concerned.

⁷ This rule is manifestly a mere application of General Principle No. IV., p. 42, *ante*. See *Boyle v. Sacker*, 1888, 39 Ch. D. (C. A.) 249; *Tharsis Sulphur Co. v. La Société des Métaux*, 1889, 58 L. J. Q. B. 435 (Action in *personam*); *Zycklinski v. Zycklinski*, 1862, 2 Sw. & Tr. 420; 31 L. J. P. & M. 37 (Divorce).

⁸ The word "action" is here used as including any proceeding of the nature of an action, *i. e.*, in which there is in substance a plaintiff and defendant, *e. g.*, a suit for divorce.

Comment.

A person who would not otherwise be subject to the jurisdiction of the Court may preclude himself by his own conduct from objecting to its jurisdiction, and thus give the Court an authority over him which, but for his submission, it would not possess.¹

This submission may take place in various ways. A defendant in an action, or for that matter a respondent in a divorce suit, who does not at the right stage take objection to the jurisdiction of the Court, but defends his case upon the merits, submits to its authority. So, again, does a person who, though he would not be otherwise liable to the Court's jurisdiction, has made it part of a contract that questions arising under the contract shall be decided by the Court. A person, further, who comes before the Court as a plaintiff in general gives the Court jurisdiction to entertain a counter-claim, or, in other words, a cross-action, against him.² Whether a person has or has not submitted to the jurisdiction of the Court depends upon the circumstances of the case; but the Court, as regards its own jurisdiction, though not invariably as regards the jurisdiction of foreign Courts, maintains the principle that submission gives jurisdiction.

In the application of this principle two things must be borne in mind.

The first is that the principle is applicable only to actions or to proceedings, such as proceedings to obtain a divorce, which partake of the nature of an action. The second is that submission can give the Court jurisdiction only to the extent of removing objections thereto which are personal to the party submitting, as, for example, the objection, in the case of a defendant, that he has not been duly served with a writ; submission cannot give the Court jurisdiction to entertain an action or other proceeding which in itself lies beyond the competence or authority of the Court.³

¹ See Intro., General Principle No. IV., p. 42, *ante*, and compare, for an example of such submission, Exception 1 to Rule 38, p. 212, *ante*.

² See *Yorkshire Tannery v. Eglinton Co.* 1884, 54 L. J. Ch. 81, 83, judgment of Pearson, J.

³ Light is thrown, as to the limits within which consent or submission can give jurisdiction, by cases on prohibition, such as *Farquharson v. Morgan*, [1894] 1 Q. B. (C. A.) 552; *Mayor of London v. Cox*, 1867, L. R. 2 H. L. 239; *Broad v. Perkins*, 1888, 21 Q. B. D. (C. A.) 533; *Buggin v. Bennett*, 1767, 4 Burr. 2035.

Illustrations.

1. *A* brings an action against *X*, who has not been duly served with a writ. *X* takes no objection to the jurisdiction of the Court on account of want of due service, but defends himself on the merits of his case. The Court has jurisdiction to entertain an action against *X*.

2. *A* brings an action against *X*, who makes a counter-claim against *A* in respect of damages due from *A* to *X* for breach of a contract made between *A* and *X* in France, and to be performed wholly in France. *A* is a French subject domiciled in France and has never been in England. If *X* had brought an action against *A* for the breach of contract, *A* might have objected to the jurisdiction of the Court. *A*'s submission gives the Court jurisdiction to entertain the counter-claim.¹

3. *X* is a French company incorporated according to French law and carrying on business at Paris, where is the company's principal office. *X* has no place of business in the United Kingdom. *A* is a copper company with registered office at Glasgow, carrying on business at Newcastle-on-Tyne. There is a contract between *A* and *X* whereby *A* agrees to sell, and *X* agrees to purchase, copper. It is part of the contract that it should be construed according to English law, and that *N* of London should be agent of *X*, "on whom any writ or other legal process arising out of the contract might be served." *X* refuses to accept copper, or to pay for the same. *A* brings action for breach of contract. Writ served on *N*. The Court has jurisdiction.²

4. *X* is a Russian subject, residing at Odessa, but carrying on business in London. Action by *A* and *B*, a London firm, for the delivery of certain goods to *A* and *B* by *X*, and for an injunction to restrain *X* from dealing with goods. *X* is not in England. Leave is obtained *ex parte* for service of writ on *N*, *X*'s solicitor. *X* appears by counsel and files affidavits, and the case is argued on its merits; objection is then taken against order allowing substituted service. The Court has jurisdiction."³

¹ See *Yorkshire Tannery v. Eglinton Co.* 1884, 54 L. J. Ch. 81.

² *Tharsis Sulphur Co. v. La Société des Métaux*, 1889, 58 L. J. Q. B. D. 435. Note that the jurisdiction arises from the contract, and is independent of the Rules of Court contained in Ord. XI. r. 1. Contrast *British Wagon Co. v. Gray*, [1896] 1 Q. B. (C. A.) 35.

³ *Boyle v. Sacker*, 1888, 39 Ch. D. (C. A.) 249. The ground of jurisdiction is that the defendant, having appeared and argued the case on the merits, cannot then take objection to the service.

5. *W*, a wife, petitions for divorce from *H*, her husband. Neither *W* nor *H* are domiciled in England. *H* appears absolutely and not under protest, and obtains further time to make an answer. He thereby precludes himself from objecting to the jurisdiction of the Court. The Court has jurisdiction to grant a divorce.¹

(ii) *In Respect of Subject-Matter.*

RULE 43.²—The Court has jurisdiction to entertain proceedings for the determination of any right over, or in respect of,

(1) any immovable,

(2) any movable,

situate in England.

This Rule must be read subject to the Rules governing the jurisdiction of the Court in particular kinds of action or proceedings.

Comment.

This Rule is of the most general description. All that it asserts is the jurisdiction of the Court in respect of all property, whether immovable or movable, situate in England. How far, if at all, the exercise of this authority is restricted by the Rules governing the jurisdiction of the Court in any particular kind of action, *e. g.*, an action *in personam* or an action *in rem*, must be gathered from such Rules.³

The jurisdiction of the Court as regards English immovables, *e. g.*, land or houses, is, as contrasted with the jurisdiction of any foreign⁴ Court, exclusive.⁵ Our Rule applies (*inter alia*) to any question as to the title to English land, whether it be freehold or leasehold (and therefore personal property⁶), under a will or under

¹ *Zycklinski v. Zycklinski*, 1862, 2 Sw. & Tr. 420. As to Divorce Jurisdiction, see chap. vii.

² Territorial jurisdiction "exists always as to land within the territory, and "it may be exercised over movables within the territory." *Sirdar Singh v. Rajah of Faridkote*, [1894] A. C. 670, 683, *per Curiam*.

³ See chaps. v. to ix., Rules 45–64, *post*.

⁴ The Rules in this Digest have, it must constantly be borne in mind, nothing to do with the relative jurisdiction of the High Court and other English Courts.

⁵ See as to Principle of Effectiveness, Intro., General Principle No. III., p. 38, *ante*.

⁶ As to personal property, see pp. 72, 73, *ante*, and Rule 61, *post*.

an intestacy : such a question must be determinable by the High Court, and cannot be determined by any foreign Court.

The jurisdiction of the Court as regards movables, *i. e.*, goods or choses in action, in England, is, as compared with the jurisdiction of foreign Courts, not exclusive. There are many cases in which the title to movables, even when situate in England, may be decided either by the High Court or by a foreign Court ; thus the right to succeed to the movables in England of a person who has died domiciled in France may be decided either by the High Court or by the French Courts. The decision, indeed, belongs preferably to the French Courts, and when given by a French Court will in general be held conclusive by our Courts.¹

Illustrations.

1. *T*, a Frenchman domiciled in France, dies intestate leaving leasehold property in England. The Court has exclusive jurisdiction to determine whether *A*, *T*'s heir under the law of France, is or is not entitled to succeed to the leaseholds.²

2. *T*, an Englishman domiciled in France, dies intestate leaving money and stock in trade in England. The Court has jurisdiction to determine whether *A*, *T*'s son, is or is not entitled to succeed to money and stock in trade.³ But the French Courts have also jurisdiction to decide the matter.⁴

RULE 44. — Subject to Rules 38 to 40, the Court exercises —

- (1) Jurisdiction in actions *in personam* ;⁵
- (2) Admiralty jurisdiction *in rem* ;⁶
- (3) Divorce jurisdiction, and jurisdiction in relation to validity of marriage and to legitimacy ;⁷
- (4) Jurisdiction in bankruptcy ;⁸

¹ See Rules 64 and 87, *post*, and *Ewing v. Orr Ewing*, 1885, 10 App. Cas. 453, 502, 503, language of Lord Selborne ; *Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301.

² See Rule 138, *post*, as to the question being determinable by the *lex situs*.

³ *Enohin v. Wylie*, 1862, 10 H. L. C. 1 ; 31 L. J. Ch. 402.

⁴ See Rules 87, 105, and 179, *post*, as to the decision being governed by the *lex domicilii* of *T*, *i. e.*, by the law of France.

⁵ See chap. v., Rules 45, 46, *post*.

⁶ See chap. vi., Rule 47, *post*.

⁷ See chap. vii., Rules 48 to 51, *post*.

⁸ See chap. viii., Rules 52 to 60, *post*.

(5) Jurisdiction in matters of administration and succession ;¹

to the extent, and subject to the limitations, hereinafter stated in the Rules² having reference to each kind of jurisdiction.

¹ See chap. ix., Rules 61 to 64, *post*.

² Including, of course, the Exceptions thereto.

AMERICAN NOTES.

CHAPTER IV.

GENERAL RULES AS TO JURISDICTION.

1. (Rule 38.) NO ACTION MAINTAINABLE AGAINST A FOREIGN SOVEREIGN OR HIS REPRESENTATIVES. — A foreign sovereign and his property are exempt from judicial process. *Schooner Exchange v. McFaddon*, 7 Cranch, 116. See *Briggs v. Light-Boats*, 11 Allen, 157. This exemption continues, as to his official acts, after his retirement from office. *Hatch v. Baez*, 7 Hun, 596. Nor can persons exercising public authority, either *de jure* or *de facto*, be held to answer for their public acts before foreign tribunals. *Underhill v. Hernandez*, 65 Fed. Rep. 577.

Judicial process, whereby the person of any public minister or of any foreign prince or state, authorised and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, is void; and any person concerned in obtaining or executing such process is subject to fine and imprisonment. Rev. Stats. of U. S. ss. 4063, 4064; *Ex parte Cabrera*, 1 Wash. C. C. 232; *United States v. Benner*, 1 Bald. C. C. 234; *United States v. Lafontaine*, 4 Cranch C. C. 173. These sections are inapplicable where the person against whom process is issued is a citizen or inhabitant of the United States, in the service of a public minister, and the process is founded upon a debt contracted before he entered such service; or where the person against whom the process is issued is a domestic servant of a public minister, unless the name of such servant has previously been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who is required to post it in some public place in his office. Rev. Stats. of U. S. s. 4065.

A secretary of legation is entitled to the same immunities as a minister. *Resp. v. De Longchamps*, 1 Dall. 111; *United State v. Jeffers*, 4 Cranch C. C. 704. So, also, an *attaché*; *United States v. Benner*, 1 Bald. C. C. 234. See 1 *Wharton's Int. Law Dig.* s. 92.

An assault committed by a public minister may be repelled in self-defence, but it does not justify his arrest on process; nor is his submission or consent any justification of such an arrest. *United States v. Benner*, 1 Bald. C. C. 234; *United States v. Ortega*, 4 Wash. C. C. 531. Ignorance of a minister's official character is no defence to a charge of assault upon him. *United States v. Ortega*, 4 Wash. C. C. 531, 537; *United States v. Liddle*, 2 Wash. C. C. 205; 1 *Wharton's Int. Law Dig.* s. 93. *Contra*, *United States v. Hand*, 2 Wash. C. C. 435. See *United States v. Ortega*, 11 Wheat. 467. As to what constitutes such an assault, see *United States v. Hand*, *supra*; *United States v. Ortega*, *supra*.

A diplomatic representative is privileged from arrest for debt when return-

ing to his own country, though his diplomatic functions have terminated. *Dupont v. Pichon*, 4 Dall. 321. So, also, is such a representative on his way from one country to another while traversing the territory of a third state. *Holbrook v. Henderson*, 4 Sandf. 619.

The best evidence of the official character of a public minister is the certificate of the Secretary of State, though other evidence is admissible. *United States v. Liddle*, 2 Wash. C. C. 205; *United States v. Ortega*, 4 Wash. C. C. 531.

A diplomatic agent is privileged from testifying as a witness, 1 *Wharton's Int. Law Dig.* s. 98; but if he waive his privilege, he is competent to testify. *United States v. Ortega*, *supra*; *Wharton's Int. Law Dig.* s. 98.

2. (Rule 39.) JURISDICTION IN RESPECT OF FOREIGN IMMOVABLES.—Such jurisdiction belongs to the courts of the territorial sovereign. *Huntington v. Attrill*, 146 U. S. 669; *Christian Union v. Yount*, 101 U. S. 352; *Carson v. Dunham*, 149 Mass. 52; 20 N. E. 312; *Danner v. Brewer*, 69 Ala. 191, 203; *Champion v. Doughty*, 18 N. J. L. 3; *Watt's Admr. v. Kinney*, 23 Wend. 484; *Chicago v. The Queen City*, 17 Ill. App. 203; *Pittsburgh v. Rothschild*, 4 Cent. Rep. 107; *Lamprey v. Metcalf* (Minn.), 53 N. W. 1139; *Port Royal R. R. Co. v. Hammond*, 58 Ga. 523. A court of equity may, however, for the purpose of securing the execution of a contract or of a trust, or of preventing fraud, or in the case of a railway in more than one jurisdiction, or on the ground of domicile within the jurisdiction, compel a party before it to take certain action in regard to foreign immovables. *Phelps v. McDonald*, 99 U. S. 298; *Pennoyer v. Neff*, 95 U. S. 714, 723; *Muller v. Downs*, 94 U. S. 444; *McElrath v. Pittsburgh, &c. Co.* 55 Pa. St. 189; *Brown v. Desmond*, 100 Mass. 267; *Felch v. Hooper*, 119 Mass. 52; *McCann v. Randall*, 147 Mass. 81; *Carson v. Dunham*, 149 Mass. 52; 20 N. E. 312; *Frank v. Peyton*, 82 Ky. 150; *Rice v. Harbeson*, 63 N. Y. 493; *Durant v. Pierson*, 19 Civ. Proc. R. 203; 12 N. Y. Supp. 348; *Wood v. Warner*, 15 N. J. Eq. 81; *Bullock v. Bullock* (N. J. Eq.), 27 Atl. 435, citing *Massie v. Watts*, 6 Cranch, 148; *Olney v. Eaton*, 66 Mo. 563; *Ross v. R. R. Co.* 53 Ga. 514; *Winn v. Strickland*, 34 Fla. 610; *Fryer v. Meyers* (Tex.), 13 So. 1025. Though such a decree does not itself operate to transfer title, yet it may, where it determines the equities of the parties, and directs a conveyance to be made in accordance with such equities, be pleaded as a cause of action, or as a ground of defence, in the courts of the State where the property lies. *Burnley v. Stevenson*, 24 Ohio St. 474. See *Jones v. Jones*, 8 Misc. Rep. 660; 30 N. Y. Supp. 177.

Whether actions to recover damages for trespass to real estate "are purely local, or may be brought abroad, depends upon the question whether they are viewed as relating to the real estate, or only as affording a personal remedy. "By the common law of England, adopted in most of the States of the Union, "such actions are regarded as local, and can be brought only where the land "is situated. . . . But in some States and countries they are regarded as transitory, like other personal actions; and whether an action for trespass to "land in one State can be brought in another State depends on the view which "the latter State takes of the nature of the action." *Huntington v. Attrill*, 146 U. S. 657, 669, and cases cited. See also, *Allin v. Connecticut Lumber Co.* 150 Mass. 560; *Manville Co. v. Worcester*, 138 Mass. 89; 52 Am. Rep. 261; *Cragin v. Lovell*, 88 N. Y. 258; *Dodge v. Colby*, 37 Hun, 515; *Tillotson v. Prichard*, 60 Vt. 94.

3. (Rule 40.) FOREIGN PENAL LAWS.—That penal laws have no extra-territorial force is a principle generally recognised in the United States. *State v. Grady*, 34 Conn. 118; *People v. Noelke*, 94 N. Y. 137; *Green v. State*, 66 Ala. 40; *State v. Carter*, 3 Dutcher, 499; *Johns v. State*, 19 Ind. 421; *State v. Chapin*, 17 Ark. 561. See *Moore on Extra-territorial Crime*, p. 70. Hence foreign sentences for penal offences are not enforced, and a foreign conviction of an infamous offence does not disqualify a witness. *Huntington v. Attrill*, 146 U. S. 657, 673; *Commonwealth v. Green*, 17 Mass. 515; *Sims v. Sims*, 75 N. Y. 466; *Campbell v. State*, 23 Ala. 44; *State v. Ridgely*, 2 Har. & McHen. 120; *Clarke's Lessee v. Hall*, 2 Har. & McHen. 378; *Cole's Lessee v. Cole*, 1 Har. & J. 572; *Uhl v. Commonwealth*, 6 Gratt. 706. *Contra*, *State v. Chandler*, 3 Hawks, 393; *Chase v. Blodgett*, 10 N. H. 22. That conviction without sentence does not disqualify, see *Wharton on Criminal Evidence*, s. 363, note 2.

The question as to what constitutes a penal law is fully discussed in *Huntington v. Attrill*, 146 U. S. 657, in which it was held that a statute making the officers of a corporation, who make a false certificate of the amount of its capital stock, liable for its debts, was not a penal law. The Court said that the question whether a law was penal depended "upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act." P. 674. See *Langdon v. N. Y., L. E. & W. R. R.* 11 N. Y. 514; *Winter v. Baker*, 50 Barb. 432; *Scott v. Roberts*, 34 How. (N. Y.) Pr. 185; *Bird v. Hayden*, 1 Roberts (N. Y.), 383; *Carnahan v. W. U. Tel. Co.* 89 Ind. 526, 46 Am. Rep. 175; *Woods v. Wicks*, 7 Lea (Tenn.), 40; *Kimball v. Davis*, 52 Mo. App. 194.

A State has jurisdiction of criminal acts committed within it by persons outside. *Adams v. People*, Comstock's Rep. 173; *People v. Rathbun*, 21 Wend. 509; *Commonwealth v. Smith*, 11 Allen, 243; *State v. Grady*, 34 Conn. 118; *Commonwealth v. Gillespie*, 7 S. & R. 469; *Commonwealth v. Corliss*, 3 Brewst. 575; *Hanks v. State*, 13 Tex. App. 289. See *Penal Code of New York*, s. 676, and *Moore on Extra-territorial Crime*, pp. 23-33. As to so-called continuing offences, see *Commonwealth v. Macloon*, 101 Mass. 1; *Tyler v. People*, 8 Mich. 320; *State v. Carter*, 3 Dutcher, 469. That the offence is committed where the act takes effect, see *Simpson v. State* (Ga.), 17 S. E. 984; 22 L. R. A. 248; *State v. Morrow* (S. C.), 18 S. E. 853; *State v. Bailey*, 50 Ohio St. 636; 31 Ohio L. J. 106; 36 N. E. 233. On this principle it was recently held that the Courts of North Carolina had no jurisdiction where a person in that State shot and killed a man in Tennessee. *State v. Hall*, 114 N. C. 909; 19 S. E. 602.

4. (Rule 41.) JURISDICTION EXTENDS TO ALL CLASSES.—The courts in the United States are open to all suitors; and personal actions of a transitory nature may be maintained in any jurisdiction within which the defendant is found, so that process may be legally served upon him. *Peabody v. Hamilton*, 106 Mass. 217; *Taylor v. Carpenter*, 2 Wood. & M. 2; *Midland Co. v. Broat* (Minn.), 52 N. W. 972; *Burdick v. Freeman*, 120 N. Y. 420; *McKenna v. Fisk*, 1 How. 241; *Mitchell v. Harmony*, 13 How. 115; *Gregg v. Union Pacific Ry. Co.* 48 Mo. App. 494. See *Dewit v. Buchanan*, 54 Barb. 31. As to how far the question of the defendant's domicile may affect jurisdiction in Louisiana, see *State v. Judge*, 21 La. An. 258; *Adams v. Scott*, 25 La. An. 528. See

Wharton, Conf. of L. s. 732, n. 8, and cases. In the United States the general rule is that personal disabilities imposed by the local law have no extra-territorial effect. *Huntington v. Attrill*, 146 U. S. 657, 673. Thus, a person who was a slave in his own country was permitted to sue in the United States. *Polydore v. Prince*, 1 Ware, 402. A person under sentence of death, and *civili-ter mortuus*, in one State, may sue in another. *Wilson v. King* (Ark.), 26 S. W. 18.

An alien or public enemy, unless under special license or protection, cannot maintain an action during the continuance of the war. *Matthews v. McStea*, 91 U. S. 7; *Kershaw v. Kelsey*, 100 Mass. 561; *Sanderson v. Morgan*, 39 N. Y. 231; *Perkins v. Rogers*, 35 Ind. 124; *Rice v. Shook*, 27 Ark. 137; *Crawford v. The William Penn*, 3 Wash. C. C. 484. But after peace is re-established, he may sue upon rights accruing before the war. *Hanger v. Abbott*, 6 Wall. 532; *Stiles v. Easley*, 51 Ill. 275. An enemy may, if sued, come in and make defence. *McVeigh v. United States*, 11 Wall. 259; *Buford v. Speed*, 11 Bush, 338; *Seymour v. Bailey*, 66 Ill. 288; *United States v. Shares of Stock*, 5 Blatchf. C. C. 231. See *Wharton, Conf. of L.* s. 737, and cases cited.

CHAPTER V.

JURISDICTION IN ACTIONS *IN PERSONAM*.

RULE 45.¹ — When the defendant in an action *in personam* is, at the time for the service of the writ, in England,² the Court has jurisdiction in respect of any cause of action, in whatever country such cause of action arises.

Comment.

That this Rule may apply, two conditions must be fulfilled.

First. The action must be an action in personam.

An action *in personam* may be defined positively, though perhaps for the purpose of this Digest a little too narrowly, as an action against a person with a view to enforce the doing by him of some particular thing, *e. g.*, the payment of damages for a breach of contract or for a tort; under this head come *inter alia* every common-law action, whether on contract or for tort, and also every equitable proceeding, the object of which is to compel the doing or the not doing of a particular thing, as, *e. g.*, the specific performance of a contract. An action *in personam* may be negatively, and, for the purpose of this Digest, somewhat more extensively described as any action which is not an admiralty action *in rem*, a probate action, or an administration action.³

It may be well, though hardly necessary, to add that an action *in personam* does not include any proceeding which is not in

¹ *Westlake*, pp. 215–225; *Story*, chap. xiv.; *Foote*, pp. 323–335, 471–476; *Ex parte Pascal*, 1876, 1 Ch. D. (C. A.) 509, 510; *Jackson v. Spittall*, 1870, L. R. 5 C. P. 542, 549; and American cases, *Peabody v. Hamilton*, 106 Mass. 217; *Roberts v. Knights*, 7 Allen (Mass.), 449. Compare *Fry v. Moore*, 1889, 23 Q. B. D. (C. A.) 395.

² See as to meaning of “England,” p. 68, *ante*.

³ Compare Rule 64 and comment thereon, *post*.

strictness an "action" at all, such as a proceeding for divorce, or for a declaration of nullity of marriage or of legitimacy, or a proceeding in bankruptcy.

Secondly. At the time for the service of the writ, the defendant must be in England.

Every action in the High Court now commences with the issue of a writ of summons,¹ which is in effect a written command from the Crown to the defendant to enter an appearance in the action; and the service of the writ, or something equivalent thereto,² is absolutely essential as the foundation of the Court's jurisdiction. Where a writ cannot legally be served upon a defendant, the Court claims no jurisdiction over him. In an action *in personam* the converse of this statement holds good, and wherever a defendant can be legally served with a writ, there the Court, on service being effected, has jurisdiction to entertain an action against him. Hence, in an action *in personam*, the rules as to the legal service of a writ define the limits of the Court's jurisdiction.³ Now, a defendant who is in England can always, on the plaintiff's taking proper steps, be legally served with a writ. The service should be personal, but if personal service cannot be effected, the Court may allow substituted or other service.⁴ In other words, the Court has jurisdiction to entertain an action *in personam* against any defendant who is in England at the time for the service of the writ.

If the conditions laid down in Rule 45 are fulfilled, the Court has the most extensive jurisdiction in respect of causes of action of every kind. Hence our tribunals have been said "to be more open to admit actions founded upon foreign transactions than those of any other European country."⁵ They in general exer-

¹ See R. S. C. Ord. I. r. 1.

² *E. g.*, an undertaking in writing to accept service, and the entering of an appearance under Ord. IX. r. 1, which is itself a mere illustration of Rule 42, p. 223, *ante*, as to the effect of submission. See further, as to service of writ, Orders IX., X., and XI.

³ See *Heinemann v. Hale*, [1891] 2 Q. B. 83, 86, 87, judgment of *Cave, J.* This is not so in all actions. In a probate action, for example, it is always possible, with the leave of the Court, to effect service on a defendant (Ord. XI. r. 3), but the Court may nevertheless not have jurisdiction. So in a proceeding for divorce, which, though not an action, partakes in some respects of the nature of an action, service of a petition or citation is not decisive of the Court's jurisdiction, which depends at bottom on the domicile of the parties. See Rules 48, 49, *post*.

⁴ See Ord. IX. r. 2.

⁵ *Phillips v. Eyre*, 1870, L. R. 6 Q. B. 1, 28, *per Curiam*. Compare *Western*

cise, as already pointed out, no jurisdiction with respect to matters relating to foreign land.¹ But, "so far as relates to the question "of jurisdiction, we apprehend," it has been laid down, "that the "superior Courts of England did not decline *jurisdiction* in the "case of *any transitory cause of action*, whether between British "subjects or foreigners, resident at home or abroad, or whether "any or every fact necessary to be proved, in order to establish "either the plaintiff's or the defendant's case, arose at home or "abroad. Though every fact arose abroad, and the dispute was "between foreigners, yet the Courts, we apprehend, would clearly "entertain and determine the cause, if in its nature transitory, "and if the process of the Court had been brought to bear "against the defendant by service of a writ on him where present in England;"² and what was true of the Superior Courts in 1870 holds good now of the High Court.

Illustrations.

1. *X* incurs a debt to *A* in France. *A* brings an action against *X*³ for the debt. The Court has jurisdiction to entertain the action.⁴

2. *X* executes at Calcutta a bond in favour of *A*. *A* brings an action against *X* on the bond. The Court has jurisdiction.⁵

3. *X*, a Frenchman, makes a contract in France with *A* for the delivery of goods by *X* to *A* in Paris. *A* brings an action against *X* for not delivering the goods. The Court has jurisdiction.⁶

4. *A* has brought an action in France against *X*, a French citizen residing in France, for a debt incurred there by *X* to *A*, and has obtained a judgment against *X*. *A* brings an action against *X* on the judgment. The Court has jurisdiction.⁷

Bank v. Perez, [1891] 1 Q. B. (C. A.) 304, 309, 311, judgment of *Esher*, M. R., 316, 317, judgment of *Bowen*, L. J.

¹ See Rule 39, p. 214, *ante*.

² *Jackson v. Spittall*, 1870, L. R. 5 C. P. 542, 549.

³ In all these illustrations to Rule 45, it is of course assumed that *X* is in England at the time for the service of the writ.

⁴ *De la Vega v. Vianna*, 1830, 1 B. & Ad. 284.

⁵ *Alliance Bank of Simla v. Carey*, 1880, 5 C. P. D. 429.

⁶ Compare *Roberts v. Knights*, 7 Allen, 449 (Am.).

⁷ Compare *Godard v. Gray*, 1870, L. R. 6 Q. B. 139, and *Schibsy v. Westenholtz*, 1870, L. R. 6 Q. B. 155.

5. *X* assaults *A* in France. *A* brings an action against *X* for the assault. The Court has jurisdiction.¹

6. *X* in Jamaica wrongfully imprisons *A*. *A* brings an action for false imprisonment against *X*. The Court has jurisdiction.²

7. *A & Co.* are an English company owning a submarine telegraph between England and France. *X* is a Swedish subject, the owner of a Swedish ship. *X*'s ship, through the negligence of the captain and sailors, strikes against and injures the telegraphic cable. The damage is done on the high seas, more than three miles from land. *A* brings an action against *X* to obtain compensation for the damage. The Court has jurisdiction.³

8. *X & Co.* are Spanish subjects, the owners of a Spanish ship, which on the high seas comes into collision with a British ship belonging to *A*, a British subject. *A* brings an action against *X* for damage caused to the ship. The Court has jurisdiction.⁴

9. *X*, an Italian subject carrying on business in England, is owner of an Italian ship. *X*'s ship comes on the high seas into collision with a British ship, and causes the death of *M*, one of the crew of such ship. *A*, the representative of *M*, brings an action against *X* to recover damages for the death of *M*. The Court has jurisdiction (?).⁵

10. *X & Co.* are British subjects, the owners of a British ship, the *Explorer*. The ship, when on the high seas, comes into collision, through the negligence of her crew, with a French ship, and kills *M*, an Italian. *A*, the representative of *M*, brings an action against *X & Co.* for damages. The Court has jurisdiction (?).⁶

11. The *Atjeh*, a Dutch ship, comes into collision on the high seas with the *Kroon-Prins*, another Dutch ship, through the negligence of the crew of the *Atjeh*. The owner of the *Atjeh*, *X*,

¹ *Scott v. Seymour*, 1862, 1 H. & C. 219; 31 L. J. (Ex.) 457; 32 L. J. (Ex.) 61.

² *Phillips v. Eyre*, 1869, L. R. 4 Q. B. 225, 1870, L. R. 6 Q. B. 1.

³ *Submarine Telegraph Co. v. Dickson*, 1864, 15 C. B. N. S. 759; 33 L. J. (C. P.) 139.

⁴ Compare *The Chartered Bank of India v. Netherlands Navigation Co.* 1883, 10 Q. B. D. (C. A.) 521; *The Leon*, 1881, 6 P. D. 148; *Re Smith*, 1876, 1 P. D. 300. In the last case the action, it is true, could not be maintained, but this was owing to the impossibility of effecting service on the defendants in England.

⁵ See *The Guldfeaze*, 1868, L. R. 2 A. & E. 325; *The Beta*, 1869, L. R. 2 P. C. 447; *The Explorer*, 1870, L. R. 3 A. & E. 289. Compare, however, *The Franconia*, 1877, 2 P. D. (C. A.) 163, with *Harris v. Owners of Franconia*, 1877, 2 C. P. D. 173, and *Seward v. Vera Cruz*, 1884, 10 App. Cas. 59.

⁶ *The Explorer*, 1870, L. R. 3 A. & E. 289. See *Roscoe, Admiralty Law*, p. 108.

is in England. *A*, the owner of the *Kroon-Prins*, brings an action against *X* for the damage done by the *Atjeh* to the *Kroon-Prins*. The Court has jurisdiction.¹

12. A steamer belonging to *A* renders salvage services to a ship on the high seas belonging to *X* and *Y*. *A* brings an action *in personam* against *X* and *Y* for the services rendered. The Court has jurisdiction.²

13. *A*, an American citizen, brings an action against *X*, an American citizen, for a libel published by *A* of *X* in New York. The Court has jurisdiction.³

RULE 46.⁴ — When the defendant in an action *in personam* is, at the time for the service⁵ of the writ, not in England, the Court has (subject to the exceptions hereinafter mentioned) no jurisdiction to entertain the action.

Comment.

When it is not legally allowable to serve a defendant with a writ, the Court (as already pointed out)⁶ has no jurisdiction to entertain an action against him; every restriction, therefore, on the legal possibility of serving a defendant with a writ, is in

¹ See *The Chartered Bank of India v. Netherlands Navigation Co.* 1883, 10 Q. B. D. (C. A.) 521, especially judgment of Brett, L. J., 536, 537; *The Leon*, 1881, 6 P. D. 148.

² *The Elton*, [1891] P. 265.

³ See *Field v. Bennett*, 1886, 56 L. J. Q. B. D. 89. In this case the defendant, Bennett, was not in England. If he had been, there would have been no difficulty in maintaining an action against him for a libel, whether published in England or the United States. See Rules 174–176, *post*.

⁴ See e. g., *In re Busfield*, 1886, 32 Ch. D. (C. A.) 123, 131, judgment of Cotton, L. J.; *Jackson v. Spittall*, 1870, L. R. 5 C. P. 542; R. S. C. Ord. XI. r. 1; *In re Eager*, 1882, 22 Ch. D. (C. A.) 86.

⁵ It has been judicially suggested (*Wilding v. Bean*, [1891] 1 Q. B. (C. A.) 100–102, judgments of Esher, M. R., and Lopes, L. J.) that if the defendant in an action *in personam* is in England at the time of the issue of the writ, and afterwards leaves England to avoid service, the Court may allow substituted service, or in effect exercise jurisdiction over a defendant who is in England at the time of the issue of the writ as though he were in England at the time for the service of the writ. But it is more than doubtful whether the Court would, or in fact has the power to, allow substituted service when the defendant is not in England, at any rate in any case which does not fall within Ord. XI. r. 1, or Ord. XLVIII A, r. 1, i. e., within the Exceptions to Rule 46. Compare *Fry v. Moore*, 1889, 23 Q. B. D. (C. A.) 395, 397, 399, judgments of Lindley, L. J., and Lopes, L. J.; *Field v. Bennett*, 1886, 56 L. J. Q. B. 89; *Hillyard v. Smith*, 1887, 36 W. R. 7.

⁶ See p. 234, *ante*.

substance a restriction on the Court's jurisdiction, and is treated as such in this work.

But at common law¹ a writ could never be served on a defendant when out of England,² and in an action *in personam* this common-law doctrine is still (subject to definite though wide exceptions) maintained; or, in other words, the Court has, as a rule, no jurisdiction to entertain an action *in personam* against a defendant who, at the time for service of the writ, is in a foreign country.

This common-law principle has been modified by Rules of Court³ made under statutory authority by the judges, and in very many actions (perhaps, numerically, in the majority of actions) service⁴ can be effected on, *i. e.*, the Court exerts jurisdiction over, a defendant who is out of England; these cases form the eight Exceptions to our Rule. The Rule and the Exceptions, taken together, constitute, what has hitherto hardly existed, a body of principles defining, in actions *in personam*, the extra-territorial jurisdiction of the Court.

As to the general character of these Exceptions, the following points should be noted.

First. They all arise under Rules of Court, and all but Exception 8⁵ arise under Rules of Court, 1883, Order XI. r. 1.

Secondly. The Exceptions are exhaustive; they are intended to embody the effect on the jurisdiction of the Court of all the Rules of Court having reference to service in an action *in personam* on a defendant who is out of England;⁶ and such Rules of Court are themselves exhaustive, the practice of the Courts,

¹ See as to proceedings by means of outlawry and distringas, *Jackson v. Spittall*, 1870, L. R. 5 C. P. 542; 3 *Blackstone*, pp. 280 and xvii; First Report of Commissioners for Inquiring into the Process, &c., of the Superior Courts of Common Law, 1851, pp. 4-7; and compare 2 *Spence, Jurisdiction of the Courts of Chancery*, p. 7, note (a), for service of writs of subpoena in suits instituted here on parties living out of England, and General Orders of 8th May, 1845, Order 32.

² See *In re Busfield*, 1886, 32 Ch. D. (C. A.) 123, 131, judgment of Cotton, L. J.

³ See especially, R. S. C. Ord. XI. r. 1.

⁴ The service may be service of the notice of a writ. "When the defendant is neither a British subject nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him." Ord. XI. r. 6. But for our present purpose service of notice is equivalent to service of a writ.

⁵ This Exception arises under Ord. XLVIII A, r. 1.

⁶ Compare, however, note at end of this chapter, as to Third Party Procedure.

whose jurisdiction is transferred to the High Court, being, except where it is expressly kept alive,¹ obsolete.²

Thirdly. There is an essential difference between the jurisdiction exercised by the Court when the defendant in an action is in England and the jurisdiction exercised by the Court when the defendant is not in England, *i. e.*, when an action comes within the Exceptions to Rule 46. When the defendant is in England, the jurisdiction of the Court is not discretionary;³ the plaintiff has a right to demand that if it exist it shall be exercised. When the defendant is not in England, the jurisdiction of the Court is to a certain extent discretionary, for the Court may, if it see fit, in general⁴ decline to allow the service⁵ or even the issue of the writ,⁶ and thus decline to exercise its jurisdiction.⁷

Fourthly. An action may fall at the same time within more than one of these Exceptions.⁸ Thus an action for the breach of a contract to be performed in England falls within Exception 5, but if the contract be a contract affecting land in England, the action falls also within Exception 2. This may be a matter of consequence, since under Exception 2 the jurisdiction of the Court is not, whilst under Exception 5 the jurisdiction of the Court is, affected by the Scotch or Irish domicil or residence of the defendant.

¹ See, *e. g.*, as to divorce, Ord. LXVIII. r. 1 (d).

² *In re Busfield*, 1886, 32 Ch. D. (C. A.) 123, 131, judgment of Cotton, L. J.; *In re Eager*, 1882, 22 Ch. D. (C. A.) 86; *Cresswell v. Parker*, 1879, 11 Ch. D. (C. A.) 601, 603, judgment of James, L. J.

³ At any rate, where personal service can be effected. As to substituted service, see R. S. C. Ord. IX. r. 2.

⁴ The jurisdiction of the Court is not discretionary in cases falling under Exception 8. See p. 257, *post*.

⁵ Ord. XI. r. 1.

⁶ Ord. II. r. 4. Conf. *The W. A. Sholten*, 1887, 13 P. D. 8.

⁷ *Great Australian Co. v. Martin*, 1877, 5 Ch. D. (C. A.) 1 (decided under R. S. C. 1875); *Société Générale de Paris v. Dreyfus Bros.* 1887, 37 Ch. D. (C. A.) 215, especially judgment of Lindley, L. J., pp. 224, 225. Compare *Call v. Oppenheim*, 1885, 1 Times L. R. 622. See also, R. S. C. Ord. XI. r. 2, as to the mode in which the discretion of the Court is to be exercised when leave is asked to serve a writ in Scotland or in Ireland. *Woods v. McInnes*, 1878, 4 C. P. D. 67; *Williams v. Cartwright*, [1895] 1 Q. B. (C. A.) 142; *Ex parte McPhail*, 1879, 12 Ch. D. 632; *Tottenham v. Barry*, 1879, 12 Ch. D. 797; *Marshall v. Marshall*, 1888, 38 Ch. D. (C. A.) 330; *Kinahan v. Kinahan*, 1890, 45 Ch. D. 78; *In re Burland's Trade-mark*, 1889, 41 Ch. D. 542.

⁸ *Tassell v. Hallen*, [1892] 1 Q. B. 321, 323-325, judgment of Coleridge, C. J.

Illustrations.

1. *X* incurs a debt to *A* at Paris for goods delivered to *X* and to be paid for by *X* in Paris. *X* is in Paris. *A* brings an action against *X*. The Court has no jurisdiction to entertain the action.

2. *X* publishes in England a libel of *A*, who is resident in England. *X* is in France. *A* brings an action against *X* for the libel. The Court has no jurisdiction.¹

3. *X* enters into a contract in England with *A* for the carriage of goods by *X* for *A* from Havre to the Mauritius. *X* is in Paris. *A* brings an action against *X* for non-delivery of the goods. The Court has no jurisdiction.²

4. *X*, an Englishman, domiciled and ordinarily resident in England, incurs at Paris a debt to *A*, payable in France, and also assaults *A* in Paris. *X* is in France. *A* brings an action against *X* for the debt and for the assault. The Court (semble) has no jurisdiction.³

*Exception 1.*⁴—The Court has jurisdiction to entertain an action against a defendant who is not in England whenever the whole subject-matter of the action is land situate in England (with or without rents or profits).

Comment and Illustrations.

This Exception applies where the whole subject-matter of the action is land in England.

1. *A* brings an action against *X* for the recovery of land in Middlesex (ejectment). *X* is in France. The Court has jurisdiction.

2. *A* brings an action against *X* for the recovery of land in Middlesex, and for mesne profits. The Court has jurisdiction.⁵

¹ *De Bernales v. Bennett*, 1894, 10 Times L. R. 419; *De Bernales v. New York Herald*, [1893] 2 Q. B. (C. A.) 97 (n).

² Note that the contract is not to be performed in England, nor is it broken in England, and therefore does not fall within Exception 4.

³ Whether the action is maintainable or not depends on the answer to the question whether it falls within Exception 3. See pp. 243–245, *post*. Most probably it does not.

⁴ R. S. C. Ord. XI. r. 1 (a). The first seven Exceptions to this Rule correspond with, and with slight verbal alterations reproduce, the seven cases (a) to (g) in which under Ord. XI. r. 1, “service out of the jurisdiction [i. e., out “of England] of a writ of summons, or notice of a writ of summons, may be “allowed by the Court or a judge.” (R. S. C. Ord. XI. r. 1.) See App., Note 6, *Service of Writ out of England*.

⁵ See *Agnew v. Usher*, 1884, 14 Q. B. D. 78, 79, language of Lord Coleridge, C. J.

*Exception 2.*¹—The Court has jurisdiction² whenever any act, deed [will³], contract, obligation, or liability affecting land or hereditaments situate in England is sought to be construed, rectified, set aside, or enforced in the action.

Comment.

This Exception applies to any action in respect of any matter affecting English land.

The terms, however, of the Exception give rise to more than one difficulty.

When, for example, does a contract, obligation, or liability “affect land”? It has been held, on the one hand, that an action by an outgoing tenant of a farm in Yorkshire to recover from his landlord compensation for tenant right, according to the custom of the country, was an action in which a contract obligation or liability “affecting” land was sought to be enforced, and that the action was therefore within Exception 2.⁴ It has been held, on the other hand, that an action to recover rent due on a lease of land in England was not an action to enforce a contract, obligation, or liability “affecting” land, and that the action therefore was not within Exception 2,⁵ and the law was in this instance thus laid down:—

“I think the more reasonable construction of [Exception 2] is “to limit it to any legal proceedings—to use the largest and most “vague term—in which English land is, according to the words “of [Exception 2], to be affected. There, as the thing to be “affected is in English jurisdiction and is not in Scotch jurisdiction, recourse should be had to the English forum. I do not pretend to give a complete or exhaustive account of all the possible “proceedings ‘affecting land’ which are probably within [Exception 2]; but, according to the ordinary rules of construction and “legal phraseology, an action to obtain payment of rent certainly

¹ Ord. XI. r. 1 (b).

² Viz., to entertain an action against a defendant who is not in England. In the illustrations to all these Exceptions it is assumed that the defendant is not in England. If he were in England, Rule 46 would have no application. See Rule 45, p. 233, *ante*.

³ This apparently refers to an administration action. See Rule 64, *post*, and comment thereon.

⁴ *Kaye v. Sutherland*, 1887, 20 Q. B. D. 147.

⁵ *Agnew v. Usher*, 1884, 14 Q. B. D. 78. So held by Q. B. D.; but the judgment of the Q. B. D. setting aside the service of a writ on the defendant, though affirmed by the Court of Appeal, was affirmed on grounds which made it unnecessary to decide whether the contract or obligation affected land. See 51 L. T. N. S. 752 (C. A.).

"is not an action to enforce any 'act, deed, or will,' and I do not think it is to enforce any 'contract, obligation, or liability affecting land within the jurisdiction.'" ¹ But it has been said that the judgment from which this quotation is taken amounted to no more "than that the action was brought for money due, and should be brought as a personal action in the forum of the defendant," ² and that "the decision of the Court only came to this, that an action against the assignee of a lease for rent due was not within" ³ Exception 2. ⁴

It is therefore impossible to lay down with any precision what are the cases in which land is "affected" within the terms of Exception 2. Any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, within section 4 of the Statute of Frauds, it may be assumed, affects lands; and an action to enforce such contract or sale, assuming the land to be in England, comes within Exception 2.

What, again, is the exact meaning of the terms "enforced in an action"? The suggestion has been made that they were intended to limit Exception 2 to actions for specific performance. "As I read those words, 'sought to be enforced in the action,'" says A. L. Smith, J., "they seem to mean 'specifically performed.'" ⁵ But this suggestion cannot, it is conceived, be accepted as sound. "I should hesitate," it has been said by Mr. Justice Charles, "to narrow the operation of [Exception 2] by holding that it only applied where specific performance of some contract or obligation was sought." ⁶

Illustrations.

1. *A* is an outgoing tenant of a farm in Yorkshire, of which *X* is landlord. *X* resides in Scotland. *A* brings an action against *X* to recover compensation for tenant right, according to the custom of the country. The Court has jurisdiction. ⁷

2. *A* brings an action against *X* for breach of a contract to give

¹ *Agnew v. Usher*, 1884, 14 Q. B. D. 78, 80, judgment of *Coleridge*, C. J.

² *Kaye v. Sutherland*, 1887, 20 Q. B. D. 147, 151, judgment of *Charles*, J. See *Tassell v. Hallen*, [1892] 1 Q. B. 321.

³ *Ibid.*

⁴ *I. e.*, of Rules of Court, 1883, Ord. XI. r. 1 (b).

⁵ *Agnew v. Usher*, 1884, 14 Q. B. D. 78, 81, judgment of A. L. Smith, J.

⁶ *Kaye v. Sutherland*, 1887, 20 Q. B. D. 147, 151.

⁷ *Kaye v. Sutherland*, 1887, 20 Q. B. D. 147, compared with *Agnew v. Usher*, 1884, 14 Q. B. D. 78; 51 L. T. N. S. 576 (C. A.) 752.

up the possession of a house in London to *A*.¹ Semble, the Court has jurisdiction.

3. *A* brings an action against *X* for breach of a contract for sale of a business, as a brickyard, accompanied with possession of the premises where it is carried on.² Semble, the Court has jurisdiction.

4. *A* brings an action against *X* for the breach of a contract for the sale of a growing crop of grass, being a natural and permanent crop not within the description of emblements or *fructus industriales*.³ Semble, the Court has jurisdiction.⁴

5. *A* brings an action against *X* to enforce specific performance of a contract for the sale by *X* to *A*, or for the lease by *X* to *A*, of a house in London. The Court has jurisdiction.

6. *A* brings an action against *X* for the rectification of a contract for the sale by *A* to *X* of land in Middlesex. The Court has jurisdiction.

7. *A* brings an action against *X*, the assignee of a lease of a house in Middlesex, for breach of covenant to repair. *X* is resident in Scotland. The action is one in which a contract or liability affecting land in England is sought to be enforced. The Court has jurisdiction.⁵

8. *A* brings an action against *X*, domiciled in Scotland, for one quarter's rent of a house at Liverpool, held under a lease for ten years. *A* claims the rent from *X* as assignee of the lease. *X* alleges that the assignment was to secure a debt, and that he never signed or accepted the assignment, or entered into possession. The Court has (semble) no jurisdiction under this Exception.⁶

9. *X* in Ireland makes a statement, in the nature of slander of title, in respect of land owned by *A* in England. *A* brings an action against *X*. The Court has no jurisdiction.⁷

Exception 3.⁸—The Court has jurisdiction whenever any relief is sought against any person domiciled or ordinarily resident in England.

¹ *Kelly v. Webster*, 1852, 12 C. B. 283 ; 21 L. J. C. P. 163.

² *Smart v. Harding*, 1855, 15 C. B. 652 ; 24 L. J. C. P. 76.

³ *Crosby v. Wadsworth*, 1805, 6 East, 602 ; 8 R. R. 566 ; *Carrington v. Roots*, 1837, 2 M. & W. 248.

⁴ These last three illustrations are merely examples of actions on contracts within the fourth section of the Statute of Frauds, and therefore (it is submitted) within Exception 2.

⁵ *Tassell v. Hallen*, [1892] 1 Q. B. 321.

⁶ *Agnew v. Usher*, 1884, 14 Q. B. D. 78, affirmed 51 L. T. N. S. (C. A.) 752.

⁷ *Casey v. Arnott*, 1876, 2 C. P. D. 24. Where, under the illustrations of a particular Exception, it is stated that "the Court has no jurisdiction," the meaning is that the Court has not jurisdiction under that particular Exception.

⁸ Ord. XI. r. 1 (e).

Comment.

The extent of this Exception depends upon the meaning of the word "relief."

"Relief" probably means such relief as, before the Judicature Acts came into operation, was obtainable in a Court of Equity and was not obtainable at common law. If this be so, the Exception applies only to an action for such relief, *e. g.*, an action for relief against forfeiture for specific performance, for the rectification of a contract, and the like.¹

"Relief" may, however, possibly include the recovery of damages in an action for breach of contract or tort, and that the word has this general meaning seems to have been assumed in at least one reported case.² If "relief" has this wide signification, then the expression "any relief is sought" is almost equivalent to "any action is brought," and domicile or ordinary residence is of itself a ground of jurisdiction, as against a defendant who would otherwise be exempt from the jurisdiction of the Court on account of his absence from England.³

The expression "domiciled or ordinarily resident" recurs in Exception 5, and also, in a slightly different form, in Rule 54, *post*.⁴

It is of importance, therefore, to note the distinction between "domicil"⁵ and "residence;"⁶ and to bear in mind that the words "domicil" and "domiciled," when employed in a Rule of

¹ *Harvey v. Dougherty*, 1887, 56 L. T. 322. And see, as to administration action, chap. ix., Rule 64, and comment, *post*.

² *Hadad v. Bruce*, 1892, 8 Times L. R. 409.

³ Exception 3 is grounded on Ord. XI. r. 1 (c), and it is very difficult to believe that the term "relief" in Ord. XI. r. 1 (c), has the widest sense that can be put upon it; for if it has, other provisions of rule 1 are either needless or futile. Thus, if this wide interpretation be given to Ord. XI. r. 1 (c), actions for tort can constantly be brought against defendants who are at the moment in a foreign country, since most Englishmen and many foreigners, though temporarily abroad, are domiciled or ordinarily resident in England; and for the same reason it will constantly be possible to maintain, against defendants who are abroad, actions on contracts not broken, nor to be performed in England, and the restriction under Ord. XI. r. 1 (e), on actions on contract against domiciled Scotchmen or Irishmen, may often be of little effect. It cannot be disputed that a domiciled Scotchman may be ordinarily resident in England.

⁴ Rule 54 is grounded on the Bankruptcy Act, 1883, s. 6, sub-s. 1 (d), and, to a great extent, defines the limits of the Court's jurisdiction in matters of bankruptcy.

⁵ See chap. ii., p. 79, *ante*.

⁶ See p. 80, note 1, *ante*.

Court or an Act of Parliament, are to be taken in their strict technical sense.¹

A man's domicile is the country which is considered by law to be his permanent home.² What is a man's domicile is, therefore, a matter of law to be determined by strictly technical rules.³ It may be either a domicile of choice⁴ or a domicile of origin;⁵ hence, under conceivable circumstances, it may happen that the jurisdiction of the Court under Exception 3, as under Exception 5, depends on the answer to the question whether the defendant's father was or was not domiciled in England at the time of the defendant's birth. A man's residence, on the other hand, is the place or country where he in fact is habitually present.⁶ Where it is that a man is ordinarily resident is a matter with which legal rules have nothing to do, and which must be ascertained in the same way as any other physical fact. A man, again, may be domiciled in one country, *e. g.*, France, and may be ordinarily resident in another, *e. g.*, England. No man can be domiciled in more countries than one,⁷ but there exists at any rate a possibility of a person having an ordinary residence in at least two countries. This would be so if a man were, as a regular habit, to pass half of every year in England and half in France.⁸ "Ordinary residence" means something more than mere temporary presence in England, though exactly what amount of presence in England amounts to "ordinary residence" is a matter which scarcely admits of exact definition.⁹

¹ *Ex parte Cunningham*, 1884, 13 Q. B. D. (C. A.) 418; *In re Hecquard*, 1889, 24 Q. B. D. (C. A.) 71.

² See definition of "domicil," pp. 65, 69, 79, *ante*.

³ See Rules 1-18, pp. 79-138, *ante*.

⁴ See p. 104, *ante*.

⁵ See p. 101, *ante*.

⁶ See chap. ii., p. 80, note 1, *ante*.

⁷ See Rule 3, p. 95, *ante*.

⁸ See *In re Norris*, 1888, 4 Times L. R. 452; *Ex parte Hecquard*, 1889, 24 Q. B. D. (C. A.) 71. Compare R. S. C., 1883, Ord. XI. r. 1 (c), (d), and (e), and Bankruptcy Act, 1883, s. 6, sub-s. 1 (d). Modern legislation exhibits a tendency to base jurisdiction on domicile or ordinary residence. See *Ex parte Cunningham*, 1884, 13 Q. B. D. (C. A.) 418; *Ex parte Barne*, 1886, 16 Q. B. D. (C. A.) 522.

⁹ Compare *Ex parte Gutierrez*, 1879, 11 Ch. D. (C. A.) 298; *Ex parte Hecquard*, 1889, 24 Q. B. D. (C. A.) 71.

Illustrations.

1. *T*, a testator, dies domiciled in Ireland. *X*, *T*'s executor, is domiciled in England, but is residing in Ireland. *A*, a legatee, brings an action against *X* for the improper investment of money received under *T*'s will. The Court has jurisdiction (?).¹

2. *A* brings an action against *X* for the rectification of a contract made between *X* and *A*. *X* is domiciled in England, but is in France. The Court has jurisdiction.

3. *X*, an Englishman, domiciled or ordinarily resident in England, makes a promise of marriage to *A*, a Greek woman, born in Syria. *X* goes abroad. *A* brings an action for breach of promise of marriage. Whether the Court has jurisdiction?²

4. *X* is domiciled in England. *X* enters into a contract with *A*, to be performed in France. *A* brings an action against *X* for breach of contract. The Court (semble) has jurisdiction.³

5. *X*, domiciled or ordinarily resident in England, assaults *A* in France. *A* brings an action for the assault. Whether the Court has jurisdiction?

*Exception 4.*⁴—The Court has jurisdiction whenever the action is for the exe-

¹ See *Harvey v. Dougherty*, 1887, 56 L. T. 322.

² *Hadad v. Bruce*, 1892, 3 Times L. R. 409. If this case is rightly decided, the Court certainly can allow the service of a writ, i. e., has jurisdiction. The service was allowed by the Divisional Court, not on the ground that the contract was to be performed in England, i. e., came within Ord. XI. r. 1 (e) (Exception 5), but on the ground that it came within Ord. XI. r. 1 (c) (Exception 3). And on this very ground it was laid down that the judge could not inquire into the existence of *prima facie* evidence of a cause of action. "There was, however, the alternative case of a defendant domiciled or resident within the jurisdiction [i. e., in England], and he thought the judge in such a case was not warranted in inquiring into the cause of action. There was, it appeared, a claim which could be maintained in the Courts of this country against a person ordinarily resident in this country; and on the plaintiff stating that she had a cause of action against such a person, she was entitled, without more, to have a writ of summons for service upon him out of the jurisdiction" (i. e., out of England). *Ibid.*, p. 410, per *Cave, J.*

³ Compare *Jones v. Scottish Insurance Co.* 1886, 17 Q. B. D. 421. In that case the action could not be maintained, but the reason was that the defendant was held by the Court not to be ordinarily resident or domiciled in England. See as to domicile of companies, Rule 19, p. 154, *ante*.

⁴ Ord. XI. r. 1 (d). The part of the Order which refers to an administration action is omitted. This omitted part gives the Court jurisdiction where the defendant is out of England, whenever "the action is for the administration of the personal estate of any deceased person who at the time of his death was domiciled within the jurisdiction" (i. e., in England).

ection (as to property situate in England)¹ of the trusts of any written instrument of which the person to be served with a writ (defendant) is a trustee, which ought to be executed according to the law of England.

Comment.

1. The property to which the trust to be executed applies must be "property which is actually situate [in England],² and not "simply property which ought to be, or if the trusts were duly "executed would be, so situate."³

2. The property must be situate in England at the time when an application is made to the Court for leave to serve a writ on the defendant out of England.

Referring to Ord. XI. r. 1 (d), on which Exception 4 is grounded, Stirling, J., has said: "The rule does not in terms "define the period at which the property is to be situate [in England], but, seeing that the rule relates to service, and that the "language with which I am dealing imposes a condition on the "fulfilment of which the propriety of the service depends, I think "the period to be regarded must be when leave to effect service is "given."⁴

3. The trust must be one which ought to be executed according to the law of England.

¹ As to the extent to which equitable interests in foreign property can exist, see *Lewin, Law of Trusts*, 8th ed., pp. 48-50.

² "Situate" means locally situate, and the local situation of personal property must, it is conceived, be in the main decided in accordance with the rules for fixing the situation of personal property for the purpose of testamentary jurisdiction. (See chap. ix., comment on Rule 62, *post*.) Thus a debt, it is submitted, is situate in the country where the debtor resides. But some of the niceties as to the local situation of personal property which originate in the practice of the Ecclesiastical Courts in regard to the grant of administration will not, it is submitted, be applied for determining the situation of property as regards the execution of a trust.

³ *Winter v. Winter*, [1894] 1 Ch. 421, 423, judgment of Stirling, J.

⁴ *Winter v. Winter*, [1894] 1 Ch. 421, 423, judgment of Stirling, J., who adds, however: "Though, if property were found [in England] when service was "actually effected, or, at the latest, when such an application as the present is "made [*i. e.*, an application to set aside the order giving the plaintiff liberty to "issue the writ for service out of the jurisdiction], the Court may possibly take "that circumstance into consideration." (*Ibid.*) In other words, the Court may possibly hold that it has jurisdiction over the defendant if property has come into England at a later period in the proceedings than the moment when leave to effect service was given, but before application was made to set aside the writ.

3. *X*, a merchant at New York, contracts to supply goods to *A*, a merchant in London, on certain terms. On arrival of goods in London they are defective and not in accordance with contract. The defects are not due to the voyage. *A* brings an action against *X* for breach of contract. The Court has jurisdiction.¹

4. *A* leases land in Middlesex to *X* and brings an action against *X* for the rent. The Court has jurisdiction.²

5. *X*, a French citizen residing in France, buys goods in London from *A*, who brings an action for the price of the goods. The Court has jurisdiction.³

6. *X*, a timber merchant residing in Sweden, contracts with *A*, in Sweden, to sell and deliver goods in England to *A*, the goods to be at the risk of *X* until delivered to *A*. *A* brings action against *X* for non-delivery. The Court has jurisdiction.⁴

7. *X & Co.*, an Indian firm, make a contract with *A* at Bombay to work certain mines in India as a joint adventure, in which *X & Co.* are to find the capital, *A* to acquire the mining rights, and each partner to take one half of the profits. *X & Co.* afterwards go into liquidation in India, and their property is vested in *Y*, a trustee residing at Bombay. *Y*, through an agent in England, enters there into a contract for the sale of the mining rights to a purchaser without mention of *A*'s rights. *A* brings an action against *X & Co.* and *Y*, claiming a declaration that under the original agreement he is entitled to half the profits of the mining adventure, etc., and an injunction to restrain *X & Co.* and *Y* from carrying agreement with purchaser in England into effect. The Court has jurisdiction.⁵

¹ *Barrow v. Myers*, 1888, 52 J. P. 345 ; 4 Times L. R. 441. Semble, on ground that breach was continuing, but surely non-delivery in England of goods according to sample is distinctly a breach in England. Compare *Gray v. Press Association*, 1887, 22 L. R. Ir. (C. A.) 1.

² See *Agnew v. Usher*, 1884, 14 Q. B. D. 78. In the particular case there was a want of jurisdiction because *X* was domiciled in Scotland, and came, therefore, within the proviso. Semble, otherwise there would have been jurisdiction.

³ See *Hewison v. Fabre*, 1888, 21 Q. B. D. 6. Semble, that in this case the error committed by the plaintiff was service of a writ instead of notice, but that the Court had jurisdiction.

⁴ *Aliter* if the goods were to be delivered to *A* in Sweden. Compare *Wancke v. Wingreen*, 1889, 58 L. J. Q. B. D. 519. See also, *Harris v. Fleming*, 1879, 13 Ch. D. 208.

⁵ The ground is, that the later contract made in England constitutes a breach in England of the contract made with the plaintiff abroad. Compare *Harris v. Fleming*, 1879, 13 Ch. D. 208, which, though decided under the Rules of 1875, seems, as far as concerns the point given in the illustration, applicable to the Rules of Court, 1883.

8. *A*, a manufacturer in Lancashire, supplies machinery to *X*, an Italian living in Italy. The contract for the supply of the machinery is made in England, and payment is to take place in England. The machinery is not paid for. *A* brings an action against *X*, who is in Italy, for the price. Semble, the Court has jurisdiction.¹

9. *X* contracts in England with *A* for the delivery at New York of cotton lying at Bombay. The cotton is not delivered. *A* brings an action against *X*. The Court has no jurisdiction.²

10. *X* contracts in India with *A* to deliver cotton of a certain quality to *A* in Scotland. The cotton is not delivered. The non-delivery of the cotton, which *A* could have used in his manufactory in England, or could have sold in England in performance of a contract with *N*, causes *A* damage in England. *A* brings an action against *X* for non-delivery. The Court has no jurisdiction.³

11. *A* agrees at Paris with *X*, a French wine merchant residing in France, to act for *X* as commission agent in England. *A* returns to England. *X*, being dissatisfied with *A*, writes and posts a letter in France wrongfully dismissing *A*. *A* brings an action against *X* for wrongful dismissal. Semble, the Court has no jurisdiction.⁴

12. *A*, in England, sells goods to *X*, residing in France. It is part of the terms of the contract that the goods shall be paid for at Paris. *X* does not pay. *A* brings an action for the price. The Court has no jurisdiction.⁵

13. *A* brings an action against *X* for non-payment of rent due under a lease of land in England. *X* is domiciled or ordinarily resident in Scotland. The Court has no jurisdiction.⁶

14. *A* is the outgoing tenant of a farm in Yorkshire. He brings an action against *X*, his landlord, who is ordinarily resi-

¹ But conf. *Dobson v. Festi*, [1891] 2 Q. B. (C. A.) 92.

² The contract, though made in England, was not to be performed in England, and no breach took place in England. The Court would have had jurisdiction under R. S. C. 1875, Ord. XI. r. 1.

³ Compare *Shearman v. Findlay*, 1883, 32 W. R. 122.

⁴ *Hamilton v. Barr*, 1886, 18 L. R. Ir. (C. A.) 297. The decision rests on the ground that the dismissal, i. e., the breach of contract, took place in the country where the letter was posted. But whether this is so?

⁵ See *Thomas v. Duchess of Hamilton*, 1886, 17 Q. B. D. (C. A.) 592. But note that actions which do not come within Exception 5 might perhaps come under Exception 3, on account of the residence or domicile of the defendant. See also, *Moritz v. Stephan*, 1888, W. N. 147.

⁶ *Agnew v. Usher*, 1884, 14 Q. B. D. 78.

dent in Scotland, to recover compensation for tenant right, according to the custom of the country. The Court has no jurisdiction.¹

15. *A* brings an action against *X* for breach of a contract to deliver goods to *A* in London. *X* is a Scotchman, who more often than not resides in England, but *X*'s domicile of origin is Scotch and he has never lost his Scotch domicile. The Court has no jurisdiction.²

16. *A* brings an action against *X & Co.* for breach of contract. *X & Co.* have registered office in Scotland, but also carry on business in England. The Court has no jurisdiction.³

17. *X* is an Englishman whose domicile is English, but who ordinarily resides in Scotland. *A* brings an action against *X* for a debt incurred and payable in England. The Court has no jurisdiction.⁴

18. *X* is an Englishwoman, married to a Scotchman, who is domiciled and habitually lives in Scotland. *X* is separated from her husband and is settled in England, but is in France. *A* brings an action against *X* for a debt incurred and payable in London. The Court has (semble) no jurisdiction.⁵

¹ But has jurisdiction under Exception 2. *Kaye v. Sutherland*, 1887, 20 Q. B. D. 147.

² Whether the Court has jurisdiction under Exception 3? See *Lenders v. Anderson*, 1883, 12 Q. B. D. 50.

³ See *Watkins v. Scottish Imperial Co.* 1889, 23 Q. B. D. 285; and compare *R. S. C.* 1883, Ord. IX. r. 8, and Companies Act, 1862 (25 & 26 Vict. cap. 89), s. 62.

"Undoubtedly there is hardship in making the plaintiff sue in the Scotch Courts, but there is an insurmountable difficulty in the way of her suing in England. The defendants are a corporation carrying on business both in Scotland and England, but their registered office is in Scotland, and they are ordinarily resident in that country. We are bound by the language of the Rules, and their clear meaning is that Scotchmen and Irishmen cannot be sued in England, if they are domiciled or ordinarily resident in Scotland or Ireland; and the effect of s. 62 of the Companies Act, 1862, which provides for service upon companies generally, and which is expressly preserved by Ord. IX. r. 8, makes the principle of these Rules applicable to Scotch and Irish corporations." 23 Q. B. D., p. 286, judgment of *Mathew, J.*

Contrast the position of a foreign company which is not a Scotch or an Irish company. *Haggin v. The Comptoir d'Escompte de Paris*, 1889, 23 Q. B. D. (C. A.) 519.

⁴ Whether the Court has jurisdiction under Exception 3? See pp. 244 and 246, note 2, *ante*.

⁵ *Ibid.* It is clear that *X* is domiciled in Scotland. See *Dolphin v. Robins*, 1859, 7 H. L. C. 390, and Rule 9, Sub-Rule 2, p. 127, *ante*.

*Exception 6.*¹—The Court has jurisdiction whenever any injunction is sought as to anything to be done in England, or any nuisance in England is sought to be prevented or removed, whether damages are or are not sought in respect thereof.

Comment.

The injunction sought for should have reference to something to be done in England, or to a nuisance in England.²

Illustrations.

1. *X*, resident in Dublin, sends cards to *A* in London, through the post-office and otherwise, containing libellous and defamatory matter. *A* brings an action claiming an injunction to restrain *X* from sending such post-cards, and also claiming damages. The Court has jurisdiction.³

2. *X & Co.* carry on business in Scotland, having a registered office in Glasgow. *X & Co.* at Manchester infringe *A*'s trade-mark. *A* brings an action to restrain infringement. The Court has jurisdiction.⁴

3. *A* is the patentee of a particular kind of watch-case. *X*, in Glasgow, sells watch-cases of the patented kind in Scotland, and also in England, and particularly in Liverpool and in Manchester. *X*, also, in answer to applications by customers in England, sends the patented watch-cases to England in return for payment in Scotland. *A* brings an action against *X* for infringement of patent, and to obtain injunction against infringement of patent by *X* in England. The Court has jurisdiction.⁵

4. *X* resides in Scotland, and there contracts with *A & Co.*, an English company, to perform certain services in the Transvaal at a salary. He goes to the Transvaal, but returns thence before he has fully performed his contract. *A & Co.* refuse to pay *X* part of salary which he claims. *X* threatens a petition for the winding up of *A & Co.* *A & Co.* bring an action against *X*, claiming (1) rescission of contract, (2) return of moneys paid,

¹ Ord. XI. r. 1 (f).

² Compare *In re De Penny*, [1891] 2 Ch. 63.

³ *Tozier v. Hawkins*, 1885, 15 Q. B. D. 650; (C. A.) 680.

⁴ *In re Burland's Trade-mark*, 1889, 41 Ch. D. 542. Compare *Marshall v. Marshall*, 1888, 38 Ch. D. (C. A.) 330.

⁵ *Speckhart v. Campbell*, 1884, W. N. 24. Compare *In re Burland's Trade-mark*, 1889, 41 Ch. D. 542, and *Kinahan v. Kinahan*, 1890, 45 Ch. D. 78.

(3) injunction to restrain *X* from presenting petition. The Court has jurisdiction.¹

*Exception 7.*²—Whenever any person out of England is a necessary or proper party to an action properly brought against some other person duly served with a writ in England, the Court has jurisdiction to entertain an action against such first mentioned person as a co-defendant in the action.

Comment.

It may be necessary or proper that a plaintiff, *A*, should make not only one person, *X*, but also some other person, *Y*, defendant in an action. This is so, for example, where *X* and *Y* are joint debtors, or where *A* has a claim, alternatively, either against *X* or *Y*. Under these circumstances, one of the defendants, *X*, may be in England and be duly served with a writ, whilst the other defendant, *Y*, may be out of England, so that it is impossible to effect service on him in England. This is the state of things to which Exception 7 applies.

In order that under these circumstances the Court may have jurisdiction within Exception 7, three conditions must be fulfilled:—

First. There must be an action properly brought against *X*, the original defendant. By “properly brought” is meant that it is brought against *X* as a principal or substantial defendant. He must not be, that is to say, a person against whom the action is brought for the sake of giving the Court jurisdiction over his co-defendant, *Y*.³

¹ *Lisbon Berlyn Gold Fields v. Hedde*, 1885, 52 L. T. 796. Semble, that the claim for an injunction gets rid of the exception as to Scotland. See *In re De Penny*, [1891] 2 Ch. 63.

² Compare the language of Ord. XI. r. 1 (g).

³ See especially, *Yorkshire Tannery v. Eglinton Co.* 1884, 54 L. J. Ch. 81. “I think,” says *Pearson, J.*, “that if I had such an application [*i. e.*, an application to allow, under Ord. XI. r. 1 (g), service of a writ on a defendant in Scotland] before me, I should require it to be shown that the person . . . served within the jurisdiction [*i. e.*, the original defendant, *X*] was “either the principal defendant, or at least as much a substantial defendant “as the person sought to be served out of the jurisdiction. I cannot think “that it is the intention of this Rule of Court [*i. e.*, Ord. XI. r. 1] to bring “into this country an action which was properly a Scotch action, simply because some person who had some trifling interest in the matters in dispute, “and who was not a principal defendant, was made a defendant and was resident here. I think that the Order means that where there is a proper English action, in which the party substantially sued is resident here, and in “which some other party [*Y*] who is out of the jurisdiction is sued in respect

The original action may be an action for a tort.¹

Secondly. *X* must be duly served with the writ in England.

It would appear to follow that Exception 7 has no application either where all the defendants, or none of the defendants, in an action, are in England. It is applicable, in other words, only where one at least of the defendants is in England and one at least of the defendants is not in England.² Hence, where Exception 7 applies, the Court may have jurisdiction to entertain an action against a person over whom, if the action had been brought against him alone, the Court would have had no jurisdiction.³

Thirdly. *Y*, who is out of England, must be either a necessary or proper party to the action.

The question whether *Y* is a proper party to an action against *X* depends on this: Supposing both *X* and *Y* had been in England, would they both have been proper parties to the action? If they would, and only one of them, *X*, is in this country, then, under our Exception, the Court has jurisdiction to entertain an action against the other, *Y*, just as if he had been in this country.⁴

"If a person is mixed up in a transaction carried out in this country by English subjects, I see no reason why he should not be dealt with, for the purpose of service of process, as if he was amenable to the jurisdiction of the Courts here. If he does not

"of some trifling claim, then that person [*Y*] may be served out of the jurisdiction." *Ibid.*, p. 83.

In order to appreciate the bearing of Mr. Justice Pearson's language, it must be remembered that the question actually before the Court is the technical question whether leave should be granted to serve a writ out of England under Ord. XI. r. 1 (g); that this, however, involves a question of jurisdiction, and that Exception 7 is based on Ord. XI. r. 1 (g). There does not, it must be added, appear to be authority for the suggestion that the interest of *Y* in the matters in dispute need be trifling. See also, *Witted v. Galbraith*, [1893] 1 Q. B. (C. A.) 577.

¹ *Croft v. King*, [1893] 1 Q. B. 419; *Williams v. Cartwright*, [1895] 1 Q. B. (C. A.) 142.

² Whether it may apply where both defendants are out of England, but one of them, *X*, is served with a writ out of England under some other clause of Ord. XI., *e. g.*, under clause (c) (Exception 3), as a person domiciled in England? The words of Ord. XI. r. 1 (g) seem to show that this question must be answered in the negative, for in the supposed case the original defendant, *X*, is not served within the jurisdiction; but see *Harvey v. Dougherty*, 1887, 56 L. T. 322, where a contrary opinion seems to be expressed or implied.

³ *William v. Cartwright*, [1895] 1 Q. B. (C. A.) 142, 145, judgment of *Esher*, M. R.; and p. 148, judgment of *Rigby*, L. J.

⁴ See *Massey v. Heynes*, 1888, 21 Q. B. D. (C. A.) 330, 338, judgment of *Esher*, M. R.

"choose to submit to the jurisdiction he must take his chances, and
 "no remedy will be effective against him unless he has property
 "in this country. I see no particular hardship in saying that he
 "must come to the Courts of this country if he wishes to defend
 "himself."¹

Exception 7 applies to a defendant domiciled or ordinarily resident in Scotland² or Ireland.

Illustrations.

1. *X*, on instructions from *Y*, enters, as agent for *Y*, into a contract with *A*. The contract is made in London, and is to be performed out of England. *Y* repudiates the contract. *A* brings an action against *X*, who is in England, for breach of warranty that *X* was authorised to contract for *Y*, who is in Austria, and has an alternative claim against *Y* if *X* was authorised to contract for him. The Court has jurisdiction to entertain an action against *Y* as co-defendant with *X*.³

2. *A* brings an action against *X* and *Y* for breach of agreement to convey to *A* their respective shares in partnership formerly carried on by *A*, *X*, and *Y*. *X* is served with a writ in England. *Y* is in the United States. *Y* is a necessary or proper party to the action. The Court has jurisdiction.⁴

3. *A & Co.*, an American company, own a patent for barbed wire. *F*, carrying on business in Ireland, buys from *N*, in America, wire which is an infringement of *A & Co.*'s patent. *X*

¹ 21 Q. B. D., p. 334, judgment of *Wills*, J.

² See the *Washburn &c. Co. v. The Cunard Co. & Parks*, 1889, 5 Times L. R. 592, judgment of *Stirling*, J.; *Massey v. Heynes*, 1888, 21 Q. B. D. (C. A.) 330, with which contrast language of *Grove*, J., and *Huddleston*, B., in *Speller v. Bristol Co.* 1884, 13 Q. B. D. 96, 98, 99. But see *Harvey v. Dougherty*, 1887, 56 L. T. 322.

³ *Massey v. Heynes*, 1888, 21 Q. B. D. (C. A.) 330. Note that, if the action had been against *Y* alone, the Court would not have had jurisdiction; in other words, the Court may have jurisdiction under Ord. XI. r. 1 (g) where it would not have jurisdiction under Ord. XI. r. 1 (e). See *Indigo Co. v. Ogilvy*, [1891] 2 Ch. (C. A.) 31.

⁴ *Lightowler v. Lightowler*, 1884, W. N. 8. "The person whom it is sought to serve is resident out of the jurisdiction [*i. e.*, out of England]; and the action, as against him, is founded on a breach of contract by him out of the jurisdiction [*i. e.*, out of England]. But it is stated that [*X*], the other defendant, has been duly served within the jurisdiction [in England]; and, as this is a partnership matter, I think that [*Y*] is a necessary or proper party." *Ibid.*, judgment of *Butt*, J.

Note that *Y*, had the action been brought against him alone, could not have been served out of England.

& Co., a steamship company, carry the wire for *Y* and land it at Liverpool for trans-shipment to *Y* in Ireland. *X* & Co. are an English company. *A* & Co. bring an action against *X* & Co. to obtain injunction against their dealing with the wire. Application for leave to add *Y* and serve *Y* with writ and notice in Ireland. The Court has jurisdiction.¹

4. *A* brings an action of deceit against *X* and *Y* in respect of a fraud jointly committed by them in London. *X* is in England. *Y* is domiciled and resident in Scotland. *X* has been served with the writ, and *Y* is a necessary and proper party to the action. The Court has jurisdiction.²

5. *A* brings an action against *X*, residing in England, and against *Y*, residing in Scotland. Before *X* is served with the writ, *A* applies for leave to serve the writ on *Y* in Scotland. The Court has no jurisdiction.³

Exception 8.⁴—The Court has jurisdiction to entertain an action against any two or more persons being liable as co-partners, and carrying on business in England, when sued in the name of the firm (if any) of which such persons were co-partners at the time of the accruing of the cause of action.

Comment.

This Exception is grounded on Order XLVIII A, rule 1.⁵

The Order appears indeed at first sight to do little more than allow and regulate "actions by and against firms and persons carrying on business in names other than their own," and not to touch the extent of the Court's jurisdiction. But Order XLVIII A, rule 1, has in reality a wider effect, at any rate as regards actions against partnerships, than this, and in such actions may extend the jurisdiction of the Court over defendants who are

¹ *Washburn &c. Co. v. Cunard Co. & Parkes*, 1889, 5 Times L. R. 592.

² *Williams v. Cartwright*, [1895] 1 Q. B. (C. A.) 142.

³ See *The Yorkshire Tannery v. Eglinton Co.* 1884, 54 L. J. Ch. 81.

⁴ R. S. C. June, 1891, Ord. XLVIII A, rr. 1, 3; *Worcester &c. Banking Co. v. Firbank*, [1894] 1 Q. B. (C. A.) 784. Compare *Grant v. Anderson*, [1892] 1 Q. B. (C. A.) 108; *Russell v. Cambefort*, 1889, 23 Q. B. D. (C. A.) 526, which, however, was decided under repealed Ord. IX. r. 6.

⁵ "Any two or more persons claiming or being liable as co-partners, and carrying on business within the jurisdiction, may sue or be sued in the name of "the respective firms, if any, of which such persons were co-partners at the "time of the accruing of the cause of action; and any party to an action may "in such case apply by summons to a judge for a statement of the names and "addresses of the persons who were, at the time of the accruing of the cause "of action, co-partners in any such firm, to be furnished in such manner, and "verified on oath or otherwise, as the judge may direct." Ord. XLVIII A, r. 1.

absent from England. For the Order provides, in actions against a firm carrying on business in England in a firm name, a mode of serving the writ at the firm's place of business in England which is applicable whether the members of the partnership be in England or not. Hence, in actions within Order XLVIII A, rule 1 (*i. e.*, Exception 8), the Court has, in effect, jurisdiction to entertain actions against persons who are not resident in England.¹

As to this Exception, the following points deserve notice.

(1) Exception 8 applies only to partners *carrying on business in England*, and carrying it on under a firm name.²

(2) Exception 8 extends to a firm, all or any of whom are foreigners or aliens. "If the firm carries on business [in England], then, whether it is an English or a foreign firm, and whether it also carries on business in a colony or abroad or not, a writ may be issued against the partners in the firm name without leave, under Order XLVIII A, r. 1,"³ *i. e.*, Exception 8 applies.

(3) Under Exception 8, the jurisdiction of the Court is not discretionary, for the writ may be served by the plaintiff in the way directed by the Order without leave of the Court.⁴

(4) Exception 8 extends to cases which may not fall within any of the foregoing seven Exceptions.⁵

Question.—Has the Court jurisdiction in cases not falling within Exceptions 1 to 7 (*i. e.*, not falling within Order XI. rule 1) to entertain an action against an individual who is not in England, but who carries on business in England in a name or style other than his own name?

The reply to this inquiry depends on the meaning of Order

¹ As to connection between rules as to the service of a writ and the jurisdiction of the Court, see *Heinemann v. Hale*, [1891] 2 Q. B. 83, 86, 87, judgment of *Cave, J.*, and pp. 234, 237, 238, *ante*.

² See Ord. XLVIII A, r. 1, p. 257, note 5, *ante*.

³ *Worcester &c. Banking Co. v. Firbank*, [1894] 1 Q. B. (C. A.) 784, 788, judgment of *Esher, M. R.*; and p. 790, judgment of *Davey, L. J.*, dissenting from opinion of *Coleridge, C. J.*, and *Wright, J.*, in *Grant v. Anderson*, [1892] 1 Q. B. 108; and contrast *Western National Bank &c. Co. of New York v. Perez*, [1891] 1 Q. B. (C. A.) 304, and *Indigo Co. v. Ogilvy*, [1891] 2 Ch. (C. A.) 31, decided before Ord. XLVIII A, r. 1, came into force.

⁴ *Ibid.* But the service must be effected exactly in the way prescribed by Ord. XLVIII A, r. 3.

⁵ Note that, in an action against a firm in the firm name, execution can as a rule, as regards partners who are not in England, issue only against the property of the partnership which is in England (Ord. XLVIII A, r. 8), and not against the property of such absent partners which is not property of the partnership.

XLVIII A, rule 11, which runs as follows: "Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style, as if it were a firm name; and, so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply."

The words of this rule *may* mean that any person who carries on business in England under a trade name, *e. g.*, "Waukenphast," may be sued in such name under any circumstances under which partners carrying on business in England under a firm name may be sued in that name; and, as it is now established that the Court can entertain an action against partners carrying on business in England under a firm name, though the members of the partnership are any or all of them out of England, and though they are aliens domiciled out of England, it would seem to follow that the Court has jurisdiction to entertain an action against a person carrying on business in England under a trade name, at any rate in respect of matters connected with such business,¹ even though he be an alien and domiciled out of England; whence it would also ensue that an individual's liability to have an action maintained against him when out of England must, in cases not falling within Exceptions 1 to 7, depend upon the answer to the inquiry whether he carries on business in his own name, *e. g.*, of John Smith, or in a trade name, *e. g.*, of "Waukenphast." But this result amounts to something like an absurdity. The interpretation, therefore, of Order XLVIII A, rule 11, which assimilates the position of an individual carrying on business in England under a trade name to that of partners carrying on business in England under a firm name, is apparently unsound, as is further shown by the fact that the Court has not, under Order XLVIII A, rule 11, jurisdiction to entertain an action against an individual if absent from England who is an alien.² Order XLVIII A, rule 11, must therefore be interpreted as intended only to enable a plaintiff to sue a defendant carrying on business in England under the defendant's trade name of "Waukenphast," instead of suing him under his proper name of John Smith. If the defendant is not in England, the jurisdiction of the Court is not extended by the fact of his using in England a trade name. "A person desiring to proceed against a single person, if he is a foreigner or a Scotsman, must go under Order XI. [*i. e.*, "under Exceptions 1 to 7], and cannot proceed under Order

¹ *Maciver v. Burns*, [1895] 2 Ch. (C. A.) 630.

² *St. Gobain &c. Co. v. Hoyer mann's Agency*, [1893] 2 Q. B. (C. A.) 96.

"XLVIII A, rule 11."¹ That is the substance and principle of the thing.

Illustrations.

1. *Y* and *Z* carry on business in London under the firm name of *X & Co.* *A* brings an action against *X & Co.* for the breach of a contract made by *X & Co.* with *A* to carry goods for *A* from France to America. *Y* and *Z* are neither of them in England. The Court has jurisdiction to entertain the action.²

2. *Y* and *Z* are residing in Natal. They carry on business under the firm name of *X & Co.* both in Natal and in England. *A* sues *X & Co.* upon a promissory note made by *Y* and *Z* in Cape Town and payable at their London office, and *A* issues a writ against them in the name of *X & Co.* The Court has jurisdiction to entertain the action.³

¹ *Maciver v. Burns*, [1895] 2 Ch. (C. A.) 630, 635, per *Lindley*, L. J.

There is, however, some difficulty in reconciling *St. Gobain &c. Co. v. Hoyermann's Agency*, [1893] 2 Q. B. (C. A.) 96, and *Maciver v. Burns*, interpreting Ord. XLVIII A, r. 11, with *Worcester &c. Banking Co. v. Firbank*, [1894] 1 Q. B. (C. A.) 784, interpreting Ord. XLVIII A, r. 1.

² See *Worcester &c. Banking Co. v. Firbank*, [1894] 1 Q. B. (C. A.) 784. It would apparently have made no difference if *Y* and *Z* had been aliens, *e. g.*, Frenchmen, carrying on business both in France and in England. *Ibid.*, pp. 787, 788, judgment of *Esher*, M. R.

³ *Ibid.*

NOTE.

THIRD PARTY PROCEDURE. — R. S. C. Ord. XVI. rr. 48–55. Where a defendant in an action claims to be entitled either to *contribution* or to *indemnity* against any person not a party to the action (called hereinafter a third party), the Court may in its discretion issue a notice to be served on the third party, and thus exercise jurisdiction, in the manner provided by Ord. XVI. rr. 48–55, over such third party. For the procedure in such case, the object of which is to enable a defendant in an action to establish conveniently his claim to contribution or indemnity against a third party who may not be a party to the action, the reader is referred to the Rules of Court, and works on practice. See, as to nature of claim, *Edison &c. Co. v. Holland*, 1889, 41 Ch. D. (C. A.) 28; *Eden v. Weardale &c. Co.* 1887, 35 Ch. D. (C. A.) 287; *Johnston v. Salvage Association*, 1887, 19 Q. B. D. (C. A.) 458; *Speller v. Bristol Steam Co.* 1884, 13 Q. B. D. (C. A.) 96. What is to be noted as regards the jurisdiction of the Court is, that its exercise is discretionary; that, within the limits laid down by Ord. XVI. rr. 48–55, it can be exercised over a third party who is not in England, subject, however, to this limitation, that it cannot be exercised in regard to a third party domiciled or ordinarily resident in Scotland or Ireland, when, if he were a defendant, the Court would not have jurisdiction over him, *i. e.*, in cases solely within Exception 5. Ord. XI. r. 1 (e). “The principle . . . of the *Swansea Case* still applies; and the effect of the decision in “that case, when read along with Ord. XI. r. 1 (e) [*i. e.*, Exception 5, p. “248, *ante*], amounts to this, that, wherever the action is founded on a “breach [in England] of a contract which, according to the terms “thereof, ought to be performed [in England], the Court may allow service of a third party notice out [of England], unless the third party “is domiciled or ordinarily resident in Scotland or Ireland.” *Dubout &c. Co. v. Macpherson*, 1889, 23 Q. B. D. 340, 342, judgment of *A. L. Smith, J.* Compare *Swansea Shipping Co. v. Duncan*, 1876, 1 Q. B. D. (C. A.) 644.

AMERICAN NOTES.

CHAPTER V.

JURISDICTION IN ACTIONS IN PERSONAM.

(Rule 45.) Personal actions of a transitory nature may be brought within any jurisdiction in which the defendant is found. *Johnston v. Trade Ins. Co.* 132 Mass. 432; *Dennick v. R. R. Co.* 103 U. S. 11; *Nelson's Admr. v. C. & O. R. R.* (Va.) 14 S. E. 838; *South Carolina R. R. Co. v. Nix*, 68 Ga. 572; *Fitzsimmons v. Guanahani Co.* 16 S. C. 192. "The distinction between transitory and local actions is this: If the cause of action is one that might have arisen anywhere, then it is transitory; but if it could only have arisen in one place, then it is local." *Cooley on Torts*, *471, and cases cited. See also, *Alger v. Alger*, 31 Hun, 471; *Bethell v. Bethell*, 92 Ind. 318.

It is essential to jurisdiction in actions in personam that the defendant should have been served with process within the territory. *Grover & Baker Machine Co. v. Radcliffe*, 137 U. S. 287; *Hart v. Sansom*, 110 U. S. 151; *Pana v. Bowler*, 107 U. S. 529; *Insurance Co. v. Bangs*, 103 U. S. 435; *Harkness v. Hyde*, 98 U. S. 476; *Pennoyer v. Neff*, 95 U. S. 714; *Guthrie v. Lowry*, 84 Pa. St. 533; *Scott v. Noble*, 72 Pa. St. 115; *Weaver v. Boggs*, 38 Md. 255; *National Bank v. Peabody*, 55 Vt. 492; 45 Am. Rep. 632; *McVicker v. Beedy*, 31 Me. 314. Or that he should voluntarily have appeared. *McCormick v. Penn. Cent. R. R. Co.* 49 N. Y. 303; *Reed v. Chilson*, 142 N. Y. 152, 36 N. E. 884; *Gilchrist v. O. & O. L. Co.* 21 W. Va. 115; 55 Am. Rep. 555; *Grover & Baker Machine Co. v. Radcliffe*, 137 U. S. 287; *Pana v. Bowler*, 107 U. S. 529; *Mehlin v. Ice*, 56 Fed. Rep. 12. This rule is applicable to an action in personam against a foreign corporation. *St. Clair v. Cox*, 106 U. S. 350; *Rothrock v. Dwellinghouse Ins. Co.* (Mass.) 37 N. E. 206. But personal service is unnecessary if the defendant is domiciled in the State (105 Mass. 504); or if the action is substantially in rem. *Hurling v. Kaw Valley Railway*, 130 U. S. 559; *Hart v. Sansom*, 110 U. S. 151; *Applegate v. Lexington, &c. Mining Co.* 117 U. S. 255; *Pennoyer v. Neff*, 95 U. S. 714; *Felch v. Hooper*, 119 Mass. 52; *Short v. Caldwell*, 155 Mass. 57; *Bleidorn v. Pilot, &c. Co.* (Tenn.) 15 S. W. 737; *Ware v. Eastern* (Minn.), 48 N. W. 775; *C. & A. Bridge Co. v. A. A. P. & P. Co.* 46 Fed. Rep. 584. See *Thompson v. Cowell*, 148 Mass. 552; *Macomber v. Jaffray*, 4 Gray, 82. See, further, as to jurisdiction, American Notes to chaps. vii. and xvi.

CHAPTER VI.

ADMIRALTY JURISDICTION *IN REM*.¹

RULE 47.²—The Court has jurisdiction to entertain an action *in rem* against any ship, or *res* (such as cargo) connected with a ship, if

(1) the action is an admiralty action ; and

(2) the ship or *res* is in England,³ or within three miles of the coast of England,

and not otherwise.

Comment.

All actions in the Courts of common law, at any rate after the passing of the C. L. P. Act, 1852, were, as all the actions in the Queen's Bench Division of the High Court now are, proceedings *in personam*.⁴ The only strict action *in rem* now existing under English law is the action which used to belong exclusively to the Court of Admiralty, and now is properly brought in the Admiralty Division of the High Court against a ship or other *res*, such

¹ See *Williams & Bruce, Treatise on the Jurisdiction &c. of English Courts in Admiralty Actions*, 2nd ed., Intro., and Part I., Jurisdiction in Admiralty, chaps. i. to ix., pp. 1-209. It is not the object of Rule 47 to give detailed information on admiralty jurisdiction, or concerning the kinds of actions which may be considered admiralty causes or actions. The object of the Rule is simply to state the extension of the Court's admiralty jurisdiction *in rem*. For further details, the reader is referred to the *Admiralty Practice*, by *Williams & Bruce*, and also to the Admiralty Court Act, 1840, 3 & 4 Vict. cap. 65, and the Admiralty Court Act, 1861, 24 Vict. cap. 10. See further, Appendix, Note 7, *List of Admiralty Claims*. See also, as to principle governing jurisdiction of Court as regards judgments *in rem*, General Principle No. III., Intro., p. 38, *ante*.

² See *Williams & Bruce*, p. 236, and Part II., chap. i. ; but as to ship on her voyage, see *Borjesson v. Carlberg*, 1878, 3 App. Cas. 1316.

³ For meaning of "England," see pp. 65, 68, *ante*.

⁴ See *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414, 427, 428, 429, opinion of *Blackburn, J.* The C. L. P. Act, 1852, abolished real actions which were actions *in rem*. Whether the action of ejectment may not be considered in effect an action *in rem* appears an open question.

as cargo or freight, connected with a ship. Its object is to satisfy the claim of the plaintiff against the *res* by the transfer, sale, or other mode of dealing with the *res*. The foundation of this action *in rem* is the arrest of the ship, or other *res*, and this arrest cannot take place unless the ship, or other *res*, is either in England or in "English waters," which means within three miles of the coast of England.¹

The conditions, therefore, under which the Court has jurisdiction to entertain an action *in rem* are two:—

First. The action must be an "admiralty action."

An admiralty action (which used to be called a cause) may be described in general terms as an action which, immediately before the coming into force of the Judicature Act, 1873, could be brought in the Court of Admiralty, or, in other words, was based on a cause of action or claim which was within the jurisdiction of the Court of Admiralty. The jurisdiction of the Court of Admiralty in civil matters depended at that date partly on its original jurisdiction, but mainly on statutory enactments, and especially on the Admiralty Court Act, 1840, 3 & 4 Vict. cap. 65, and the Admiralty Court Act, 1861, 24 Vict. cap. 10. An admiralty action or cause always had reference to shipping, or to contracts or transactions more or less closely connected with shipping. Every claim, in short, which the Court of Admiralty had jurisdiction to entertain, had to a certain extent a maritime character. Examples of such claims are claims depending on questions arising between the co-owners touching the ownership, possession, employment, and earnings of any ship registered at any port in England;² claims to enforce bottomry bonds;³ claims for damage done or received by any British or foreign ship;⁴ claims for salvage, and the like. To give a definition covering all, and no more than all, the claims in respect of which the Court of Admiralty had jurisdiction is, it is conceived, hardly possible,

¹ *Williams & Bruce*, 2nd ed., p. 249. "The warrant [for the arrest] may be "served anywhere within the jurisdiction, that is, in England or Wales, or "within three miles of the coast." *Ibid.* See *Borjesson v. Carlberg*, 1878, 3 App. Cas. 1316. Compare *The Nautik*, [1895] P. 121. Of course a ship might be arrested when in a Scotch, or Manx, or Jersey port, etc. But such arrest would be beyond the territorial limits of the High Court's jurisdiction, and would not give that Court the right to entertain an action against the ship.

² See *Williams & Bruce*, pp. 21-30, and Admiralty Court Act, 1861 (24 Vict. cap. 10), s. 8.

³ *Williams & Bruce*, pp. 42-70.

⁴ *Ibid.*, pp. 71-113; 3 & 4 Vict. cap. 65, s. 6; 24 Vict. cap. 10, s. 7. *Conf. M. S. Act, 1894* (57 & 58 Vict. cap. 60), s. 688.

and, for the purpose of this work at any rate, unnecessary. They must, in any case, be arrived at by a process of enumeration rather than of definition. All that need here be insisted upon is, that an admiralty action is an action in respect of a claim or matter over which the Court of Admiralty had jurisdiction until that jurisdiction was transferred by the Judicature Act, 1873, to the High Court, and that such a claim was always of a more or less maritime character.¹

Secondly. The ship or other *res* must be in England, or in English waters.

It should, however, further be remarked that the admiralty jurisdiction of the High Court may be exercised either by proceedings *in rem* or by proceedings *in personam*; the plaintiff, that is to say, may in most instances, at his option, bring an action either² *in rem*, against the ship or other *res*, or *in personam* against the owner of or other person interested in the ship or *res*, or both *in rem* against the ship and *in personam* against the owner or such other person.³

¹ See, for an enumeration of, at any rate, the principal claims in respect of which proceedings could be maintained in the Court of Admiralty, App., Note 7, *List of Admiralty Claims*. It may be well to note that the question whether an admiralty action lies, and therefore whether the Court has jurisdiction to give judgment *in rem*, may often depend on the precise terms of some provision in the Admiralty Court Act, 1840, or the Admiralty Court Act, 1861.

² See Admiralty Court Act, 1861, s. 35, and *Williams & Bruce*, pp. 236, 316.

³ *Action in rem*, — *judgment in rem*, — *maritime lien*. These three things, which are sometimes confused together, should be carefully distinguished.

1. An action *in rem* is a proceeding to determine the right to, or disposition of, a thing under the control of a Court. The only proceeding *in rem* now existing under English law is, as already pointed out, an action *in rem* in the Admiralty Division.

2. A judgment *in rem* is a judgment whereby a Court adjudicates upon the title to, or the right to the possession of, property within the control of the Court. (*Castrique v. Imrie*, 1870, L. R. 4 H. L. 414, 428; *Story*, s. 492.)

An action *in rem* does not of necessity lead to a judgment *in rem*. A brings an action against a ship for wages due to him as a sailor. X, the shipowner, appears and pleads to the action. The action may end, not in a judgment *in rem* against the ship, but in a judgment *in personam* against X, condemning him to pay, *e. g.*, £100 and costs to A.

3. A maritime lien is the right which a person has to the satisfaction of a given claim against a ship in whosoever's hands the ship may be. Such a lien binds the ship, not only when in the hands of the owner on whose behalf a debt or other obligation has been contracted, but also when in the hands of any person whomsoever. A maritime lien can be enforced only by proceedings in an admiralty action *in rem*. One instance of a maritime lien is this: if A obtains a judgment *in rem* against a ship in a foreign country, *e. g.*, France, he can, on

The Court has no jurisdiction to entertain an action against a ship or other *res* unless both the conditions of Rule 47 are fulfilled, i. e., unless the action is an admiralty action and the ship or *res* is in England or in English waters.

Illustrations.¹

1. A co-ownership action is brought by *A* against a ship registered at the port of Liverpool. The Court has jurisdiction.²

2. *A* is the indorsee of a bottomry bond granted in Portugal by the master of an Italian ship, *The Gaetano*, on the ship, and her cargo on board. *A* brings an action *in rem* against *The Gaetano*. The Court has jurisdiction.³

3. A British ship, *The Clara Killam*, casts anchor near the South Foreland. Her anchor gets foul of a submarine telegraph cable. Under the master's direction, the cable is cut in order to free the anchor. The owners of the cable bring an action against *The Clara Killam* in respect of the injury to the cable. The Court has jurisdiction.⁴

4. *A* and *B* save the lives of the passengers and crew of a British ship off the coast of France. *A* and *B* bring an action of salvage against the ship, claiming more than £800. The Court has jurisdiction.⁵

5. *A* brings an action against *The Vera Cruz* for loss of life of *H*, the husband, and *N*, the son of *A*, in consequence of the negligence of the master and crew of *The Vera Cruz*. The action is brought under Lord Campbell's Act, 9 & 10 Vict. cap. 93. The Court has no jurisdiction to entertain the action, or, semble, any other action *in rem*, for the loss of life.⁶

the ship reaching an English port, bring an action against the ship for the amount of the judgment, whoever be the person who is then owner of the ship. (*The City of Mecca*, 1881, 6 P. D. (C. A.) 106, and Rule 103, *post*. See, as to maritime lien, *Northcote v. Owners of Henrich Bjorn*, 1886, 11 App. Cas. 270, especially 276, judgment of Lord Watson, and compare *The Bold Buccleugh*, 1851, 7 Moore P. C. 267.) With a maritime lien the Rules in this chapter have no concern.

¹ In all the illustrations of this Rule it is assumed, unless otherwise stated, that the ship is in an English port or in English waters.

² See 24 Vict. cap. 10, s. 8; *Williams & Bruce*, p. 28.

³ *The Gaetano*, 1881, 7 P. D. 1 (C. A.) 137.

⁴ *The Clara Killam*, 1870, L. R. 3 A. & E. 161; Admiralty Court Act, 1861 (24 Vict. cap. 10), s. 7. Compare *The Griefswald*, 1859, Swabey, 430.

⁵ 24 Vict. cap. 10, s. 9; M. S. Act, 1894 (57 & 58 Vict. cap. 60), ss. 544, 547.

⁶ *The Vera Cruz*, 1884, 10 App. Cas. 59. The reason is, that neither under Lord Campbell's Act, nor otherwise, is an action for loss of life an admiralty action. See 24 Vict. cap. 10, ss. 7, 35. Contrast *The Clara Killam*, 1870, L. R. 3 A. & E. 161; *The Sylph*, 1867, L. R. 2 A. & E. 24.

6. *A* and *B* save the lives of the passengers of a British ship off the coast of France. The ship is in Port Douglas, in the Isle of Man. *A* and *B* have a claim for £500 salvage. The Court has no jurisdiction to entertain an action by *A* and *B* for salvage against the ship.¹

¹ The ship is not in England or in English waters. See *Williams & Bruce*, p. 249.

AMERICAN NOTES.

CHAPTER VI.

ADMIRALTY JURISDICTION *IN REM*.

(Rule 47.) Admiralty jurisdiction *in rem*, instance as well as prize, is exclusively vested in the District Courts of the United States. *The Belfast*, 7 Wall. 624; *The Lottawana*, 21 Wall. 558; *The E. B. Ward, Jr.* 17 Fed. Rep. 456; *The J. F. Warner*, 22 Fed. Rep. 342. Process must be served upon the vessel within the limits of the district. *The Hungaria*, 41 Fed. Rep. 109; *Pinckney v. The Hungaria*, 42 Fed. Rep. 510. Proceedings may be taken *in personam*, as well as *in rem*, for the same cause of action. *Thomassen v. Whitwell*, 9 Ben. 113; *La Normandie*, 58 Fed. Rep. 427; *Heney v. The Josie*, 59 Fed. Rep. 782; *The J. F. Warner*, 22 Fed. Rep. 342. But the jurisdiction *in personam* is not exclusive either in the District Courts or in the Courts of the United States. *Henry, Juris. and Proc. Admy.* s. 2. The Courts of Admiralty have jurisdiction of collisions on the high seas between vessels of different nationalities. *The Belgenland*, 114 U. S. 355. And of torts committed on the high seas, without reference to the nationality of the vessels or of the parties. *The Noddleburn*, 28 Fed. Rep. 855. See *The Carolina*, 14 Fed. Rep. 424; *The Montapedia*, 14 Fed. Rep. 427. But, in the absence of a statute, not of suits *in rem* for damages for the death of a human being. *The Harrisburg*, 119 U. S. 199, reviewing the cases. Such a suit must be brought within the time prescribed in the statute. *The Harrisburg*, 119 U. S. 199. Jurisdiction of libels for seamen's wages is discretionary. *The Karoo*, 49 Fed. Rep. 651; *The Sirius*, 47 Fed. Rep. 825; *The Progresso*, 46 Fed. Rep. 292; *The Topsy*, 44 Fed. Rep. 631; *The Belgenland*, 114 U. S. 355; *The Lillian M. Vigus*, 10 Ben. 385. The Act of Congress limiting liability for the embezzlement, loss, or destruction of property, or for loss by collision, etc. (Revised Statutes, s. 4282 *et seq.*), is administered as part of the general maritime law. *The Scotland*, 105 U. S. 24; *Re Leonard*, 14 Fed. Rep. 53. An exception of liability in a contract made by the master of a foreign vessel in a foreign country will be enforced as to acts done within the territorial jurisdiction of such country. *The Trinacria*, 42 Fed. Rep. 863.

A United States district court in admiralty has jurisdiction in foreign attachment, in a suit to recover a balance on an average adjustment. *National Board of Marine Underwriters v. Melchers*, 45 Fed. Rep. 643.

See, as to the effect of special treaty provisions touching consular jurisdiction, *Wildenhus' Case*, 120 U. S. 1; *Williams v. The Welhaven*, 55 Fed. Rep. 80.

CHAPTER VII.

JURISDICTION IN RESPECT OF DIVORCE — DECLARATION OF NULLITY OF MARRIAGE —AND DECLARATION OF LEGITIMACY.

I. DIVORCE.¹

(A) WHERE COURT HAS JURISDICTION.

RULE 48. — The Court has jurisdiction to entertain proceedings for the dissolution of the marriage of any parties domiciled in England at the commencement of the proceedings.

This jurisdiction is not affected by —

- (1) the residence of the parties,² or
- (2) the allegiance of the parties,³ or
- (3) the domicile of the parties at the time of the marriage,⁴ or
- (4) the place of the marriage,⁵ or
- (5) the place where the offence in respect of which divorce is sought, is committed.⁶

¹ *Browne, Divorce*, 3rd ed., pp. 1–24 ; *Phillimore*, ss. 491–521 a ; *Westlake*, 3rd ed., pp. 74–88 ; *Foote*, 2nd ed., pp. 85–99 ; *Story*, ss. 200–230 b ; *Wharton*, ss. 204–239 a. See, as to jurisdiction in divorce and its connection with domicile, Sub-Rule to General Principle No. III., Intro., p. 41, *ante*.

² See *Dolphin v. Robins*, 1859, 7 H. L. C. 390.

³ *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1.

⁴ *Wilson v. Wilson*, 1872, L. R. 2 P. & D. 435. Compare *Harvey v. Farnie*, 1882, 8 App. Cas. 43, and *Turner v. Thompson*, 1888, 13 P. D. 37.

⁵ *Ibid.*, and *Ratcliff v. Ratcliff*, 1859, 1 Sw. & Tr. 467.

⁶ *Ibid.*

Since the “citation,” which corresponds with the writ in an action, may be served out of England, the jurisdiction of the Court is not affected by the absence of the respondent from England during the proceedings for divorce.

Comment and Illustrations.

The principle now in the main adopted by English Courts¹ is, that jurisdiction in matters of divorce depends upon domicile, or, in other words, that the question whether parties to a marriage ought to be divorced is one which concerns the authorities of the country where they live and have their legal home, and that, therefore, the Courts of the country where the parties are so living, i. e., are domiciled, at the time of the demand for a divorce, are the Courts to which in general ought to be referred the question whether the marriage between the parties should or should not be dissolved.

"It is," says a high judicial authority, "the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another."²

"It seems," says Lord Justice Brett, "that the only Court

¹ They at one time inclined towards the quite different principle that the right to divorce depended upon the terms of the marriage contract, and, therefore, upon the law under which the marriage was celebrated, and hence held that the jurisdiction in matters of divorce belonged exclusively to the Courts of the country under the law of which the marriage took place, which was in the great majority of instances (if not always) the country where the marriage was celebrated. See *Tovey v. Lindsay*, 1813, 1 Dow. 117; *Lolley's Case*, 1812, 2 Cl. & F. 567; *McCarthy v. De Caiz*, 1812, 2 Cl. & F. 568; App., Note 8, *Theories of Divorce*, and App., Note 9, *Effect of Foreign Divorce on English Marriage*. *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1, makes it difficult to determine what is the precise principle adopted by the High Court as to the limits of its jurisdiction.

² *Wilson v. Wilson*, 1872, L. R. 2 P. & D. 435, 442, judgment of Lord Penzance. This statement of the law is in conformity with the expressions of Lord Westbury in *Shaw v. Gould*, 1868, L. R. 3 H. L. 55, 85, but is not, it must be admitted, in harmony with the language of the majority of the Court in *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1.

"which, on principle, ought to entertain the question of altering the relation in any respect between parties admitted to be married, or the status of either of such parties arising from their being married, on account of some act which by law is treated as a matrimonial offence, is a Court of the country in which they are domiciled at the time of the institution of the suit. If this be a correct proposition, it follows that the Court must be a Court of the country in which the husband is at the time domiciled, because it is incontestable that the domicile of the wife, so long as she is a wife, is the domicile which her husband selects for himself, and at the commencement of the suit she is *ex hypothesi* — still a wife." ¹

Hence the Court has jurisdiction to grant a divorce in any case, without exception, where the domicile of the parties (*i. e.*, in effect of the husband) is English at the commencement of the proceedings for divorce.

H and *W* are married in India. Adultery is committed by *W* in India. *H*, being domiciled in England, institutes a suit for divorce against *W*. The Court has jurisdiction to grant a divorce. ²

H and *W* are a Scotch husband and wife domiciled in Scotland, who have married in Scotland. *W*, during the continuance of the Scotch domicile, commits adultery in Scotland. *H* afterwards acquires an English domicile, and then applies to the English Court for a divorce. At the time of the application, and throughout the proceedings, *W*, the wife, is in fact resident in Scotland. In prior proceedings before the Scotch Courts by *W* against *H*, these Courts held that *H* was domiciled in Scotland. *H* has, as a matter of fact, in the judgment of the High Court, acquired an English domicile. The Court has jurisdiction to pronounce a divorce between *H* and *W*. ³

¹ *Niboyet v. Niboyet*, 1878, 4 P. D. 1, 13, 14, judgment of Brett, L. J. The rest of the Court, James, L. J., and Cotton, L. J., do not, it should be noticed, assent to the principle laid down by Brett, L. J.; but, considering the state of the authorities, the general view maintained by Brett, L. J., is, it is submitted, still to be considered as probably sound. *Niboyet v. Niboyet*, if it be rightly decided, may, as far as the actual decision goes, be explained as extending the number of exceptional cases in which residence gives jurisdiction in matters of divorce. The dicta of the majority of the Court cannot be so explained, but they are, it is submitted, opposed to other dicta of weight, and cannot be taken as authoritative.

² *Ratcliff v. Ratcliff*, 1859, 1 Sw. & Tr. 467.

³ *Wilson v. Wilson*, 1872, L. R. 2 P. & D. 435. If it be borne in mind that

Of the various other circumstances which might be thought material, none are, it is conceived, of importance as *limiting*¹ the jurisdiction of the Court.

As to residence. — Residence, as contrasted with domicile,² is certainly unimportant. *H* and *W* are domiciled in England, but reside in France. *W* commits adultery in Paris. *H*, though residing abroad, can obtain a divorce from the Court.³

As to allegiance. — This is the tie by which a person is connected with a state⁴ as being a subject of the sovereign of such state; and it might be thought that as a person's connection with a particular political society depends upon his allegiance, or in more popular language, his nationality, jurisdiction to declare whether a given person is to be considered married or unmarried would belong to the Courts of the state or nation of which he is a member or citizen. This, however, is not the view of English tribunals. In perfect consistency with the view that civil, as contrasted with political, status depends upon domicile, they hold that the jurisdiction of an English Court to grant a divorce is not affected by the allegiance of the parties. *H* and *W* are French subjects domiciled at Manchester, where *W* commits adultery. The Court has jurisdiction to grant a divorce.⁵

As to domicile, etc. — That the domicile of the parties at the time of the marriage, the place of the marriage, or the place where the offence, in respect of which divorce is sought, was committed, has no effect in limiting the jurisdiction of the Court is certain.⁶

Whatever be, at the time of a marriage, the domicile of the parties thereto, or the country where the marriage is celebrated, the Court has no jurisdiction to entertain proceedings for a dissolution of

Scotland and Ireland are, as regards divorce, to be considered foreign countries (*Yelverton v. Yelverton*, 1859, 1 Sw. & Tr. 574, 585), it will be seen that the decision in *Wilson v. Wilson* supports to the full the doctrine that the Court has jurisdiction over all persons domiciled in England.

¹ Some of them may be of importance as giving jurisdiction.

² See *Dolphin v. Robins*, 1859, 7 H. L. C. 390, 406, for expressions of Lord Chelmsford contrasting residence and domicile, and p. 80, note 1, *ante*.

³ See *Gillis v. Gillis*, 1874, 8 Ir. R. Eq. 597.

⁴ For difference between "state" and "country," see pp. 64, 66–68, *ante*.

⁵ *Niboyet v. Niboyet*, 1878, 4 P. D. 1. In this case no objection seems to have been made to the divorce on the ground of the husband being a French citizen, and the mere fact of a foreign allegiance does not appear in any reported case to have been treated by the Court as a ground for declining jurisdiction.

⁶ *Wilson v. Wilson*, 1872, L. R. 2 P. & D. 435, is sufficient, without other authorities, to establish this. See *Ratcliff v. Ratcliff*, 1859, 1 Sw. & Tr. 467.

the marriage for any offence which is not a ground for divorce under the law of England.¹

H and *W*, a Scotchman and Scotchwoman, are, when domiciled in Scotland, married at Edinburgh. They afterwards acquire an English domicile. *H* maliciously deserts *W* for more than four years. Under the law of Scotland, such desertion is a cause for divorce. The Court has no jurisdiction to entertain proceedings by *W* for a dissolution of the marriage, desertion not being a ground for divorce under the law of England.

(B) WHERE COURT HAS NO JURISDICTION.

RULE 49.²—Subject to the exception hereinafter mentioned, the Court has no jurisdiction to entertain proceedings for the dissolution of the marriage of any parties not domiciled in England at the commencement of the proceedings (?).

Comment and Illustrations.

This Rule will be found to be in conformity with the general run of the authorities, though there are one or two cases³ which make its absolute validity open to question.

H and *W* his wife are domiciled in Ireland. *W*, who is resident in England, institutes proceedings for divorce against *H*, who appears under protest. The Court has no jurisdiction to grant a divorce.⁴

H and *W* marry in Jersey. *H* afterwards deserts *W* and acquires a domicile in the United States. *W* resides in England and acquires a domicile there, as far as it can be acquired by a married woman whilst her husband is domiciled elsewhere.⁵ *W* takes proceedings against *H* for the dissolution of their marriage

¹ For meaning of "law of England," see p. 75, *ante*.

² *Yelverton v. Yelverton*, 1859, 29 L. J. P. & M. 34; 1 Sw. & Tr. 574; *Le Sueur v. Le Sueur*, 1876, 1 P. D. 139. Contrast *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1, which, however, is disapproved of by the Privy Council in *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

³ See *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1; *Brodie v. Brodie*, 1861, 30 L. J. P. & M. 185; *Deck v. Deck*, 1860, 2 Sw. & Tr. 90; 29 L. J. P. & M. 129.

⁴ See *Yelverton v. Yelverton*, 1859, 1 Sw. & Tr. 574; 29 L. J. P. & M. 34, which, however, is a case of a suit for restitution of conjugal rights.

⁵ As to domicile of married women, see Rule 9, Sub-Rule 2, p. 127, *ante*.

on the ground of bigamy with adultery.¹ The Court has no jurisdiction to grant a divorce.²

Question. — Is residence, not amounting to domicile, a ground of jurisdiction?

First. It may be maintained that under the Matrimonial Causes Act, 1857,³ the Court has jurisdiction to divorce persons who, though not domiciled in England, have their "matrimonial home"⁴ (whatever may be the precise meaning of these words) in England.

This contention, which amounts to laying down the principle that the Court's jurisdiction in matters of divorce depends not, exclusively at any rate, on the domicile, but on the more or less permanent residence in England of the parties to a divorce suit, rests upon the decision of the Court of Appeal in *Niboyet v. Niboyet*, of which the following are the material facts. *H*, a Frenchman, married *W*, an Englishwoman, at Gibraltar. *H* and *W* resided for some years in England, but *H*, since he resided in England as French consul, retained his French domicile of origin and never acquired an English domicile. *W* presented a petition for divorce on the ground of adultery committed in England, and desertion. *H* appeared under protest and objected to the jurisdiction. It was held in the Probate Division that the Court had no jurisdiction,⁵ but the Court of Appeal, reversing the judgment of the Probate Division, held that the Court had jurisdiction.⁶ This judgment of the Court of Appeal, if it can be upheld, certainly establishes that residence not amounting to domicile may give the Court jurisdiction. But the decision is open to grave criticism. It is opposed to the current of English cases, which have tended more and more clearly to base divorce jurisdiction upon domicile; it is not supported by any other case of weight; it has the effect of claiming for the Court a jurisdiction which English judges do not concede to foreign tribunals; it has recently been disapproved of by the Privy Council. Their Lordships not only dissent from the judgments of the majority⁷ of the Court of Appeal, but also point out the fallacy of the reasoning on which these judgments are grounded.

¹ See the Matrimonial Causes Act, 1857 (20 & 21 Vict. cap. 85), s. 27.

² *Le Sueur v. Le Sueur*, 1876, 1 P. D. 139.

³ 20 & 21 Vict. cap. 85, ss. 27, 31.

⁴ *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1, 6, judgment of *James*, L. J.

⁵ *Niboyet v. Niboyet*, 1878, 3 P. D. 52.

⁶ *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1.

⁷ *James & Cotton*, L. JJ., *dissentiente Brett*, L. J.

"The main reason assigned for their decision, by the learned judges of the majority, was that, before the Act of 1857 became law, the petitioner would have been entitled to sue her husband in the Bishop's Court, although he was not domiciled in England, and to ask either for restitution of conjugal rights, or for a divorce *a mensâ et thoro*, and in either case for proper alimony; and consequently that, after the Act of 1857 passed, jurisdiction in divorce might be exercised in the same circumstances. There appears to their Lordships to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence without domicile sufficient to sustain a suit for restitution of conjugal rights, for separation, or for alimony; but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their Lordships cannot construe sect. 27 of the Act of 1857 as giving the English Court divorce jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishop's Court."¹

Niboyet v. Niboyet then must, it is submitted, be treated as of most doubtful authority. But, if we except the judgment of the Court of Appeal in *Niboyet v. Niboyet*, there exists no valid ground for asserting that under the Matrimonial Causes Act, 1857, the High Court has, as a general rule at any rate, jurisdiction to divorce persons who though resident are not domiciled in England.

Secondly. It may be maintained that the Court possibly has jurisdiction to entertain proceedings for the dissolution of an English marriage² between British subjects on the petition of a wife who is resident but, on account of her husband's change of domicile, is no longer domiciled in England.*

In favour of this contention there is a good deal to be said. The existence indeed of the exceptional jurisdiction contended for does not appear to be fully or conclusively established, but it may be vindicated on the ground of the injustice to a wife, especially if she be a British subject who has married in England, of pressing to its full extent the legal fiction by which she is supposed to be always domiciled in the same country as her husband, and of

¹ *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, 531, judgment of the P. C., which consisted of *Herschell*, Ch., Lord *Watson*, Lord *Hobhouse*, Lord *Macnaghten*, Lord *Morris*, and Sir *Richard Couch*.

² For meaning of "English marriage," see comment on Rule 83, *post*.

* Compare *Deck v. Deck*, 1860, 2 Sw. & Tr. 90; 29 L. J. P. & M. 129, with *Le Sueur v. Le Sueur*, 1876, 1 P. D. 139.

thus in effect enabling him by a change of domicile to impede or frustrate¹ her claim to a divorce.²

The answer therefore to the question raised is that in general residence not amounting to domicile is not a ground of jurisdiction, but that in some exceptional cases a wife may possibly, for the purpose of maintaining proceedings for divorce, be treated as having a domicile of her own in England, or, in other words, that in this instance residence which does not technically amount to domicile may give the Court jurisdiction. But even this cannot be treated as certain.

*Exception.*³—The Court has jurisdiction to entertain proceedings for the dissolution of a marriage between parties who are not domiciled in England at the time of the proceedings for divorce where the respondent has appeared absolutely and not under protest, and thereby submitted to the jurisdiction of the Court.

II. DECLARATION OF NULLITY OF MARRIAGE.

RULE 50.⁴—The Court has jurisdiction to entertain a suit for the declaration of the nullity of any existing marriage⁵ celebrated in England.

Comment.

Jurisdiction to entertain a suit for the declaration of the nullity of a marriage, and to pronounce it a nullity, depends, not on the domicile of the parties, but on the place where the marriage is cele-

¹ If a wife who marries a husband domiciled in England can under no circumstances obtain a divorce in England unless her husband retains his English domicile, he clearly may, by becoming domiciled in a country, *e. g.*, Italy, where divorce is not allowed, deprive his wife of any means of obtaining a divorce.

² Compare *Dolphin v. Robins*, 1859, 7 H. L. C. 390, 416, 419, language of Lord Cranworth; *Le Sueur v. Le Sueur*, 1876, 1 P. D. 139, 140–142, language of Sir Robert Phillimore; and *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1, 14, language of Brett, L. J.

³ *Zycklinski v. Zycklinski*, 1862, 2 Sw. & Tr. 420. This is a mere application of Rule 42, p. 223, *ante*.

⁴ The Matrimonial Causes Act, 1857 (20 & 21 Vict. cap. 85), s. 6; *Simonin v. Mallac*, 1860, 2 Sw. & Tr. 67; *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1; *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1, 17, judgment of Brett, L. J.; *Linke v. Van Aerde*, 1894, 10 Times L. R. 426.

⁵ A suit for declaration of nullity cannot be entertained after a decree of separation by reason of adultery (*Guest v. Shipley*, 1820, 2 Hagg. Const. 321), or after the death of one of the parties (*A. v. B.*, 1868, L. R. 1 P. & D. 559), nor, semble, after a divorce of the parties.

brated.¹ English Courts may adjudicate upon the validity of a marriage celebrated in England, *i. e.*, upon the question whether a marriage has or has not been in fact contracted, without impugning the doctrine that a marriage admitted to be valid can be dissolved only by the Courts of the country where the parties are domiciled at the time of the commencement of the proceedings for a divorce. Domicil, indeed, cannot be the test of jurisdiction, for the domicil of the woman may depend on the very point demanding decision, *viz.*, the validity of the marriage.²

The law has been thus laid down in a case in which the Court was asked to pronounce a decree of nullity, where both the parties were aliens, and neither of them was domiciled in England at the time when the suit was brought, but the marriage was celebrated in England: —

“The marriage contract was entered into here, and on that ground this Court was asked to deal with it. In *Simonin v. Mallac*³ the parties to the marriage were domiciled French people; but the marriage was celebrated here, and the judge held that he had jurisdiction to deal with the contract. In *Sottomayor v. De Barros*,⁴ the parties were Portuguese, and not resident or domiciled here, but the case was decided here. In *Niboyet v. Niboyet*,⁵ the Master of the Rolls⁶ said that the principles of dissolution of marriage did not apply to nullity suits, and that in these suits the validity of the ceremony was to be determined according to the law of the place in which it was celebrated. The jurisdiction of this Court to deal with the question of the validity of the marriage of the parties to the present suit was therefore clear.”⁷

¹ *Simonin v. Mallac*, 1860, 2 Sw. & Tr. 67; 29 L. J. P. & M. 97. Westlake, however, holds that jurisdiction in this instance depends upon residence. “The jurisdiction,” he writes, “of the English Court in suits for a declaration of nullity of marriage, or in respect of jactitation of marriage, depends on the defendant’s being resident in England, not on a visit or as a traveller, and not having taken up that residence for the purpose of the suit.” *Westlake*, 3rd ed., p. 82. Compare p. 302. He cites *Williams v. Dormer*, 1852, 2 Rob. 505. The case is, however, not quite decisive, and is hardly consistent with *Simonin v. Mallac*.

² This jurisdiction forms an exception to the ordinary principle as to the criterion of jurisdiction. See Intro., General Principle No. III., p. 38, *ante*.

³ 1860, 2 Sw. & Tr. 67.

⁴ 1877, 3 P. D. (C. A.) 1.

⁵ 1878, 4 P. D. (C. A.) 1.

⁶ *Brett*, L. J.

⁷ *Link v. Van Aerde*, 1894, 10 Times L. R. 426, judgment of *Gorell Barnes*, J.

Illustration.

H, a Frenchman, and *W*, a Frenchwoman, domiciled in France, are married in London in accordance with all the formalities required by English law, but without the consents required by French law. The marriage is declared a nullity by a French Court. *W*, when residing in England, petitions to have the marriage declared a nullity. *H* is in Italy, and though summoned does not appear. The Court has jurisdiction to determine whether the marriage is valid.¹

III. DECLARATION OF LEGITIMACY.

RULE 51.²

- (1) Any natural-born British subject, or any person whose right to be deemed a natural-born British subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate³ situate in England, may apply by petition to the Court, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to the Court for a decree declaring that his marriage was, or is, a valid marriage; and the Court has jurisdiction to hear and determine such application, and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the Court may

¹ *Simonin v. Mallac*, 1860, 2 Sw. & Tr. 67; 29 L. J. (P. & M.) 97; *Linke v. Van Aerde*, 1894, 10 Times L. R. 426.

² Legitimacy Declaration Act, 1858 (21 & 22 Vict. cap. 93), ss. 1, 2, 8.

³ But whether in this case "personal estate" is not to be confined to interest in land?

seem just; and such decree, except as hereinafter mentioned, is binding to all intents and purposes on the Crown, and on all persons whomsoever.

- (2) Any person, being so domiciled or claiming as aforesaid, may apply by petition to the Court for a decree declaratory of his right to be deemed a natural-born British subject, and the Court has jurisdiction to hear and determine such application, and to make such decree thereon as to the Court may seem just; and where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition; and every decree made by the Court, except as hereinafter mentioned, is valid and binding to all intents and purposes upon the Crown and all persons whomsoever.¹
- (3) The decree of the Court does not in any case prejudice any person, unless such person has been cited or made a party to the proceedings, or is the heir at law or next of kin, or other real or personal representative of, or derives title under or through, a person so cited or made a party; nor shall such sentence or decree of the Court prejudice any person, if subsequently proved to have been obtained by fraud or collusion.²

¹ Legitimacy Declaration Act, 1858, s. 2.

² The Legitimacy Declaration Act, 1858 (21 & 22 Vict. cap. 93), s. 8. This Rule in substance repeats ss. 1, 2, and 8 of the Legitimacy Declaration Act, 1858, with one or two verbal alterations intended simply to make it read as a Rule. It is to be noted that the Court referred to in the Act is the Court for Divorce and Matrimonial Causes. But the original jurisdiction of this Court has been transferred to the High Court (see Judicature Act, 1873, ss. 3, 4, 16), and is in effect exercised by the Probate, Divorce, and Admiralty Division of the High Court (*Ibid.*, s. 31).

As to Ireland, see the Legitimacy Declaration Act (Ireland), 1868, 31 Vict. cap. 20; and as to Scotland, see *Mackay, Manual of Practice of the Court of Session*, p. 379, and the Legitimacy Declaration Act, 1858, s. 9.

Comment.

Conditions of Jurisdiction. — The jurisdiction of the Court depends upon the petitioner fulfilling certain conditions: —

1. He must be a *natural-born* British subject,¹ or a person claiming to be a natural-born British subject; and it is doubtful whether, in spite of the wide terms of the Naturalization Act, 1870, s. 7,² an alien to whom a certificate of naturalization is granted is a natural-born British subject within Rule 51.³

2. The petitioner must at the time of presenting his petition either be domiciled in England or Ireland, or claim real or personal estate in England.⁴

The words "real or personal estate" probably mean land or immovables. The term "personal estate" can hardly in this connection include goods or choses in action.

He does not fulfil the requirements of our Rule if he is domiciled out of England and Ireland, (*e. g.*, in the Isle of Man) unless he claims property in England. It will not bring him within it if, when domiciled, *e. g.*, in Scotland, he claims property in Ireland.

While the petitioner's domicile may be either English or Irish the estate claimed must be in England.

3. He must petition the Court to declare one or any of the following things: —

- (a) The legitimacy of the petitioner.
- (b) The validity of the petitioner's own marriage.
- (c) The validity of the marriage of the petitioner's parents or grandparents.
- (d) The petitioner's right to be a natural-born British subject.

Nature of Jurisdiction. — When the above conditions are fulfilled⁵ (and not otherwise), the Court has jurisdiction to declare —

- (i) The legitimacy or the illegitimacy of the petitioner.
- (ii) The validity or invalidity of any marriage which the Court is petitioned to declare valid.

¹ As to natural-born British subjects, see pp. 173, 175–180, *ante*.

² See Rule 25, p. 181, *ante*.

³ *I. e.*, within the Legitimacy Declaration Act, 1858.

⁴ 21 & 22 Vict. cap. 93, ss. 1 and 2.

⁵ Compare *Mansel v. Attorney-General*, 1877, 2 P. D. 265; 1879, 4 P. D. 232; *Scott v. Attorney-General*, 1886, 11 P. D. 128; *Brinkley v. Attorney-General*, 1890, 15 P. D. 76.

- (iii) That the petitioner has, or has not, a right to be deemed a natural-born British subject.

This jurisdiction applies as well to past as to existing marriages, and is a totally different thing from the authority inherited by the Court from the Ecclesiastical Courts to entertain a suit for the declaration of the nullity of an existing marriage.¹ A petitioner cannot, under Rule 51 (*i. e.*, under Legitimacy Declaration Act, 1858), pray to have a marriage declared invalid, or any person declared illegitimate, or not a British subject, though the decree of the Court may declare invalid a marriage which it is asked to declare valid, and, when asked to declare the legitimacy or the British nationality of the petitioner, may declare that he is illegitimate, or is not a natural-born British subject.²

The decree of the Court is *primâ facie* valid, and binding to all intents and purposes upon all persons whomsoever, including the Crown; but if certain persons interested in the decree are not cited, neither they nor their representatives are prejudiced thereby,³ and the decree is, like other judgments, ineffective (*i. e.*, it does not prejudice any person), if proved to have been obtained by fraud or collusion.⁴

Illustrations.

1. *A*, a natural-born British subject domiciled in England, marries first at Cape Town, and then in London, *N*, who has been divorced at Cape Town from her husband for adultery with *A*. The validity of either marriage under the law of Cape Town is doubtful. *A* petitions to have his marriage with *N* declared valid. The Court has jurisdiction.⁵

2. *A*, a natural-born British subject whose domicile is Irish, is for a time settled in Japan, and there marries a Japanese woman according to forms required by Japanese law. *A* petitions for a declaration that his marriage is valid. The Court has jurisdiction.⁶

3. *A* is a natural-born British subject domiciled in France, and claiming a freehold estate in Middlesex. *A* petitions to have himself declared the legitimate son of his parents, or to have the marriage in France of his parents declared valid. The Court has jurisdiction.

¹ See Rule 50, p. 276, *ante*.

² 21 & 22 Vict. cap. 93, s. 1.

³ See Rule 51, clause 3, p. 279, *ante*, and 21 & 22 Vict. cap. 93, s. 8.

⁴ *Ibid.*, and see, as to Effect of Foreign Judgments in England, chap. xvi., especially Rule 90, *post*, and compare generally, as to due acquisition of rights, Intro., General Principle No. I., p. 22, *ante*.

⁵ *Scott v. Attorney-General*, 1886, 11 P. D. 128.

⁶ *Brinkley v. Attorney-General*, 1890, 15 P. D. 76.

4. *A* is born, and is domiciled, in France, and has lived in France till the age of 22. *A*'s father was also born in France. *A*'s paternal grandfather was an Englishman born in England, who married, or is alleged to have married, *A*'s grandmother at Paris. *A* claims a freehold estate in Middlesex. *A* petitions to have the marriage of his grandfather and grandmother declared valid. The Court has jurisdiction.¹

5. The circumstances are the same as in Illustration No. 4, except that *A* petitions to be declared a natural-born British subject. The Court has jurisdiction.²

6. *A* is a Frenchman who has become a naturalized British subject under the Naturalization Act, 1870; he is domiciled in England; he petitions to have it declared that he is the legitimate child of his parents. *Semble*, the Court has jurisdiction.³

7. *A* is a natural-born British subject domiciled in France. He claims to succeed, as next of kin, to *goods* situate in England. He petitions to have himself declared the legitimate son of his parents. *Semble*, the Court has no jurisdiction.⁴

8. *A* is a natural-born British subject. He is domiciled in Scotland. He claims real estate in Ireland. He petitions to be declared the legitimate child of his parents. The Court has no jurisdiction.⁵

9. *A*, a natural-born British subject domiciled in England, petitions the Court for a declaration that he is his father's heir at law. The Court has no jurisdiction.⁶

10. *A* alleges in his petition that the marriage of the petitioner's grandfather with the petitioner's grandmother is a valid marriage, and that he is entitled to succeed to a baronetcy. The Court has no jurisdiction to adjudicate upon a claim to a title of honour.⁷

¹ This case is certainly within the words of the Legitimacy Declaration Act, 1858, s. 2. Now, however, that an alien can take, acquire, hold, and dispose of real or personal property of any description in the United Kingdom (Naturalization Act, 1870, s. 2), it appears to a certain extent an anomaly that a claim to real estate in England should be a sufficient ground to give the Court jurisdiction to declare the claimant a British subject.

² *Ibid.*

³ Whether the Court has jurisdiction or not depends upon the answer to the question whether the effect of the Naturalization Act, 1870, s. 7, is to make the petitioner a natural-born British subject within the meaning of 21 & 22 Vict. cap. 93, s. 1. See Rule 25, p. 181, *ante*.

⁴ Whether the Court has jurisdiction depends on the meaning of the term "personal estate" in Rule 51, i. e., in 21 & 22 Vict. cap. 93, s. 1.

⁵ The petitioner is neither domiciled in England nor in Ireland, nor does he claim real or personal estate in England.

⁶ *Mansel v. Attorney-General*, 1877, 2 P. D. 265; 1879, 4 P. D. 232.

⁷ *Frederick v. Attorney-General*, 1874, L. R. 3 P. & D. 196.

AMERICAN NOTES.

CHAPTER VII.

JURISDICTION IN RESPECT OF DIVORCE—DECLARATION OF NULLITY OF MARRIAGE—AND DECLARATION OF LEGITIMACY.

1. (Rules 48, 49.) JURISDICTION TO GRANT DIVORCE. — The Courts, as a general rule, are not invested with jurisdiction in matters of divorce unless at least one of the parties is domiciled within the State. *De Meli v. De Meli*, 120 N. Y. 485; 24 N. E. 996; *Watkins v. Watkins*, 135 Mass. 83; *Shaw v. Shaw*, 98 Mass. 158; *Harding v. Alden*, 9 Me. 140; *Valk v. Valk* (R. I.), 29 Atl. 499; *Foss v. Foss*, 58 N. H. 283; *State v. Arrington*, 25 Minn. 29; *Carniff v. Carniff*, 49 Mich. 478; *Larquie v. Larquie*, 40 La. An. 475; *Thompson v. Thompson*, 91 Ala. 591; *McShane v. McShane*, 45 N. J. Eq. 341; 19 Atl. 465; *Arrington v. Arrington*, 102 N. C. 491; 9 S. E. 200; *Morgan v. Morgan*, 1 Tex. Civ. App. 315; 21 S. W. 154; *Trevino v. Trevino*, 54 Tex. 261; *Platt's App.* 80 Pa. St. 501; *Ralston v. Ralston*, 13 Phila. 30; *Oakley v. Oakley*, 11 Pa. Co. Ct. 572; 1 Pa. Dist. 781. The term "residence," in statutes defining jurisdiction, is generally construed to mean domicil. *De Meli v. De Meli*, 120 N. Y. 485; 24 N. E. 996; *McShane v. McShane*, 45 N. J. Eq. 341; 19 Atl. 465; *Firth v. Firth* (N. J. Eq.), 24 Atl. 916; *Bradstreet v. Bradstreet*, 7 Mackey, 229; *Richards v. Richards*, 19 D. C. 431; *Carpenter v. Carpenter*, 30 Kans. 712. In *Chapman v. Chapman*, 129 Ill. 386; 21 N. E. 806, the construction is doubtful. But see *Bowman v. Bowman*, 24 Ill. App. 165, and *Albee v. Albee*, 141 Ill. 550, in which it is said there must be "a *bonâ fide* intention of establishing a residence in this State." In Kentucky "residence" is held to mean actual residence, as distinguished from domicil. *Tipton v. Tipton*, 87 Ky. 243. And see *Wood v. Wood*, 54 Ark. 172; 15 S. W. 459. In Texas actual habitancy has been required, though the party was domiciled there. *Haymond v. Haymond*, 74 Tex. 414; 12 S. W. 90. But, though each State may prescribe the conditions of divorce within its own limits, divorces founded upon mere residence are not recognised as valid in other States. 2 *Bishop, Mar., Div., and Separation*, ss. 50, 51; *Wharton, Conf. of L.* ss. 223, 228. Generally, residence or domicil on the part of the complainant is sufficient or requisite to give jurisdiction. *Franklin v. Franklin*, 154 Mass. 515; 28 N. E. 681; *Albee v. Albee*, 141 Ill. 550; *McShane v. McShane*, 45 N. J. Eq. 341; 19 Atl. 465; *Jones v. Jones* (Miss.), 6 So. Car. 712; *Lochrane v. Lochrane*, 78 Ky. 467; *Carpenter v. Carpenter*, 30 Kan. 712; *Valk v. Valk* (R. I.), 29 Atl. 499; *Wood v. Wood* (Ark.), 15 S. W. 459; *Richards v. Richards*, 19 D. C. 431; *Pate v. Pate*, 6 Mo. App. 49; *Haymond v. Haymond*, 74 Tex. 414; 12 S. W. 90. See *Am. Law Register*, February, 1877, p. 71 *et seq.* Sometimes domicil at the time of the offence is required. *A. B. v. C. B.* 34 N. J. Eq. 43; *Perzel v. Perzel* (Ky.), 15 S. W. 658; *Wharton, Conf. of L.* s. 231. But, generally, domicil confers jurisdiction without regard to the place of the marriage or of the

offence. *D'Auvilliers v. De Livandais*, 32 La. An. 605; *Franklin v. Franklin*, 154 Mass. 515; 28 N. E. 681; *Firth v. Firth*, 50 N. J. Eq. 137; *Jones v. Jones* (Miss.), 6 So. 712; *Ditson v. Ditson*, 4 R. I. 87; *Harding v. Alden*, 9 Me. 140; 2 *Bishop, Mar., Div., and Separation*, ss. 38, 160-178. The domicile must be *bonâ fide*. *Jones v. Jones* (Miss.), 6 So. 711; *Albee v. Albee*, 141 Ill. 550; 31 N. E. 153; *Smith v. Smith*, 43 La. An. 114; 10 So. 248. But if the *animus manendi* really exists, the motive of the complainant in selecting his domicile is immaterial. *Fosdick v. Fosdick*, 15 R. I. 130; 23 Atl. 140; *Colburn v. Colburn*, 70 Mich. 647. See *Ellis v. Ellis* (Minn.), 56 N. W. 1056, to the effect that, the elements of jurisdiction existing, collusion does not avoid the judgment.

For the purposes of divorce jurisdiction, a wife may have a domicile separate from that of the husband. *Burtis v. Burtis* (Mass.), 37 N. E. 740; *Burlen v. Shannon*, 115 Mass. 438; *Harteau v. Harteau*, 14 Pick. 181; *Barber v. Barber*, 21 How. 582; *Hewes v. Hewes*, 61 Hun. 625; 16 N. Y. Supp. 119; *Arrington v. Arrington*, 102 N. C. 491; 9 S. E. 200; *Smith v. Smith*, 43 La. An. 1140; 10 So. 248; *Tolen v. Tolen*, 2 Blackf. 407; *White v. White* (R. I.), 27 Atl. 506; *Bowman v. Bowman*, 24 Ill. App. 165; *McConnell v. McConnell*, 37 Neb. 57. But a wife cannot gain a domicile by her own wrong. *Suter v. Suter* (Miss.), 16 So. 678; *Babbitt v. Babbitt*, 69 Ill. 277; *Heath v. Heath*, 42 La. An. 437; 7 So. 540.

Whatever may be the view taken as to the international or interstate validity of a divorce, where the defendant, not being domiciled within the territory, was not served with process therein, the statutes of most of the States provide for extra-territorial service, either actual or constructive. *Ditson v. Ditson*, 4 R. I. 87; *Butler v. Washington*, 45 La. An. 279; 12 So. 356; *Wharton, Conf. of L.* s. 237. See *Oakley v. Oakley*, 11 Pa. Co. Ct. 572; 1 Pa. Dist. 781. But the statutory requirements in this regard must be strictly followed. *Cheely v. Clayton*, 110 U. S. 701; *Prettyman v. Prettyman*, 125 Ind. 149; 25 N. E. 179; *Heath v. Heath*, 4 La. An. 437; 7 So. 540; *Northcut v. Lemery*, 8 Or. 316; *Atkins v. Atkins*, 9 Neb. 191. And it has been held that when the defendant is a non-resident, has not been served with process within the State, and has not appeared, the decree must be confined to a dissolution of the marital relation, and cannot impose disability to marry again. *Garner v. Garner*, 56 Mo. 127.

2. (Rule 50.) JURISDICTION AS TO NULLITY OF MARRIAGE. — Jurisdiction to avoid a voidable marriage, or to declare a void marriage void, except so far as courts of equity, acting upon the contractual element of marriage, may assume to exercise such jurisdiction for original defects, depends upon statutes. 2 *Bishop, Mar., Div., and Separation*, ss. 794-809. Very generally, however, suits for nullity are discussed and treated as divorce suits. See *A. B. v. B. C.* 34 N. J. Eq. 43; *J. G. v. H. G.* 33 Md. 401.

CHAPTER VIII.

JURISDICTION IN BANKRUPTCY AND IN REGARD TO WINDING-UP OF COMPANIES.

I. BANKRUPTCY.¹

(A) WHERE COURT HAS NO JURISDICTION.

RULE 52.—The Court has no jurisdiction to adjudge bankrupt any debtor who has not committed an act of bankruptcy within the terms of Rule 58.

The term “the Court,”² in this Rule and in Rules 53 to 58, means a Court having jurisdiction in bankruptcy, under the Bankruptcy Act, 1883,³ and includes

- (1) the High Court, and
- (2) any County Court having jurisdiction in bankruptcy under the said Act.⁴

¹ See the Bankruptcy Act, 1883 (46 & 47 Vict. cap. 52), ss. 4, 6, 7, 20, 92, 93, 168; the Bankruptcy Act, 1890, s. 1; Bankruptcy Rules, 1883, r. 148; *Baldwin, Law of Bankruptcy*, 4th ed., pp. 1-67; *Westlake*, 3rd ed., pp. 146-152; *Nelson*, 163-166.

It is not the aim of these Rules to enumerate all the circumstances under which the jurisdiction of the Court depends, and still less to state generally the law of bankruptcy; these Rules, further, do not state what are the circumstances under which bankruptcy proceedings should be taken in the High Court or in the County Court respectively. All the English bankruptcy Courts are, for the purpose of these Rules, treated as if they were one Court. The object of these Rules in regard to bankruptcy is to show how far the jurisdiction of the High Court or any other English bankruptcy Court is or is not affected in a given case by the case containing some foreign element, *e. g.*, by the debtor being an alien domiciled abroad, or by his debts having been incurred abroad.

² It is convenient, for the purpose of Rules 52-58, to thus extend the meaning of the term “Court.” See p. 64, *ante*.

³ 46 & 47 Vict. cap. 52, s. 168.

⁴ *Ibid.*, s. 92.

Comment.

An "act of bankruptcy" is one of the series of acts enumerated in Rule 58, the commission of which by a debtor is evidence of his insolvency. The existence of the Court's jurisdiction to entertain bankruptcy proceedings against any debtor arises from the commission by him of an act of bankruptcy.¹ The Court, therefore, cannot possibly have any bankruptcy jurisdiction over a debtor who has not committed an act of bankruptcy.

Illustrations.

1. *X* is domiciled in a foreign country. *X* has contracted debts in England, and files in a Court of such foreign country a declaration of his inability to pay his debts. *A*, an English creditor, treats this as an act of bankruptcy, and presents a bankruptcy petition against *X*. But the alleged act of bankruptcy is one which can be committed only in England.² The Court has no jurisdiction to entertain the petition, or to adjudge *X* a bankrupt.

2. *X*, a Portuguese subject domiciled in Portugal, contracts a debt to *A* in England. *A* brings an action against *X* for the debt, and serves *X* with a writ. *X*, in consequence, leaves England for Portugal. *A* presents a bankruptcy petition against *X*. The alleged act of bankruptcy is that *X* has departed out of England with intent to defeat his creditors.³ The mere return by *X* to his own country is not such an act of bankruptcy. The Court has no jurisdiction.⁴

3. The case is the same as in Illustration No. 2, except that the alleged act of bankruptcy is the remaining out of England, namely, in Portugal, by *X* with intent to defeat his creditors. *X* being an alien domiciled in Portugal, his being there is not such an act of bankruptcy. The Court has no jurisdiction.⁵

RULE 53.⁶ — The Court has no jurisdiction to adjudge

¹ *Ex parte Crispin*, 1873, L. R. 8 Ch. 374.

² See Rule 58, clause (f), p. 300, *post*.

³ See Rule 58, clause (d), p. 300, *post*.

⁴ *Ex parte Crispin*, 1873, L. R. 8 Ch. 374.

⁵ *Ibid*.

⁶ *Ex parte Blain*, 1879, 12 Ch. D. (C. A.) 522; *In re Pearson*, [1892] 2 Q. B. (C. A.) 263. And see *Ex parte Crispin*, 1873, L. R. 8 Ch. 374.

Whether the Court may, subject to the effect of Rule 54, have jurisdiction to adjudge bankrupt, in respect of an act of bankruptcy committed *out of England*, an alien who is not domiciled in England, but is there at the time of

bankrupt any debtor who is not a debtor subject to the English bankruptcy law.

A debtor is not "a debtor subject to the English bankruptcy law" unless he either —

- (1) commits an act of bankruptcy in England, or,
- (2) being a British subject [or (seem) being domiciled in England], commits an act of bankruptcy out of England.

Comment.

An act of bankruptcy can be committed only by a "debtor."

The word "debtor," however, is a very wide one and must receive some qualification; for since the jurisdiction of the Court depends on the commission of an act of bankruptcy by a debtor, "unless we put some limit on the word 'debtor,' it will come to this, that any man who has never been in England, a subject of a foreign state, can be made a bankrupt in England because in a foreign state he has done a certain act."¹

The true interpretation of the general word "debtor," in the Bankruptcy Act, is a debtor subject to the English bankruptcy law. "Section 4 of the Act of 1883 [which Rule 58 in effect "repeats] relates only to debtors who are subject, either by birth and natural allegiance or by temporary residence, to the English law."² "The whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted, or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects, or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction."³ "The governing principle is, that all legislation

the presentation of the bankruptcy petition? Contrast the language of *Melish*, L. J., in *Ex parte Crispin*, with the language of *Brett*, L. J., in *Ex parte Blain*.

¹ *Ex parte Blain*, 1879, 12 Ch. D. (C. A.) 522, 531, judgment of *Cotton*, L. J. Though *Ex parte Blain* is decided under the Bankruptcy Act, 1869, 32 & 33 Vict. cap. 71, the principle of it applies to the Bankruptcy Act, 1883. See *In re Pearson*, [1892] 2 Q. B. (C. A.) 263.

Note, however, that the words of *Cotton*, L. J., refer to an act which did not contain any provision corresponding to the Bankruptcy Act, 1883, s. 6 (d), which is reproduced in Rule 54, *post*.

² *In re Pearson*, [1892] 2 Q. B. (C. A.) 263, 268, judgment of *Fry*, L. J.

³ *Ex parte Blain*, 1879, 12 Ch. D. (C. A.) 522, 526, judgment of *James*, L. J., cited *In re Pearson*, p. 268, in judgment of *Fry*, L. J.

"is *primâ facie* territorial, that is to say, that the legislation of any country binds its own subjects, and the subjects of other countries who for the time bring themselves within the allegiance of the legislating power."¹

In other words, the debtor to whom the bankruptcy law applies must be a debtor subject to the law of England.²

The term, however, "debtor subject to the English bankruptcy law," or "debtor subject to the law of England," is vague, and itself needs explanation. Its meaning is defined, or at any rate limited, by clauses 1 and 2 of our Rule.

1. Any debtor who (whether a British subject or an alien, whether domiciled in England or elsewhere) commits an act of bankruptcy in England is a debtor subject to the English bankruptcy law.³

"The English Legislature has a right to make a bankruptcy statute, which shall bind all its own subjects, and any foreigner who for the time is in England, and does something there which the statute forbids. As long as he is in England he is under the allegiance of the Queen of England, and in the power of the English Legislature. Therefore it has been held⁴ [under the Bankruptcy Act, 1869], that if a foreigner, though not domiciled or permanently resident in this country, comes into England, and does or omits to do some act in England which the

¹ *Ex parte Blain*, p. 528, judgment of Brett, L. J., cited, *In re Pearson*, p. 268, judgment of Fry, L. J.

² See *In re Pearson*, [1892] 2 Q. B. (C. A.) 263, 268, judgment of Fry, L. J.

³ *Ex parte Crispin*, 1873, L. R. 8 Ch. 374, 379, *per Curiam*. (Compare *Ex parte Blain*, 1879, 12 Ch. D. (C. A.) 522, 528, judgment of Brett, L. J.) Note particularly that in *Ex parte Crispin*, the debtor was a Portuguese subject domiciled in Portugal, and was in Lisbon when the bankruptcy petition was presented. The debt was incurred in England, but *Ex parte Pascal*, 1876, 1 Ch. D. (C. A.) 509, shows that this was immaterial. The sole basis of jurisdiction was, therefore, the commission of an act of bankruptcy in England. It seems, then, clear that though the requirements of the Bankruptcy Act, 1883, s. 6, 1 (d), would make it impossible now to bring the debtor in *Ex parte Crispin* within the Bankruptcy Act, yet that he is a debtor within s. 4. The principle of *Ex parte Crispin*, in short, still holds good, and the words of *Melish*, L. J., in *Ex parte Pascal*, 1876, 1 Ch. D. (C. A.) 509, 512, "it was decided in *Ex parte Crispin* that if a foreigner comes to England and contracts debts, and commits an act of bankruptcy in England, he can be adjudicated a bankrupt," are to be taken in their full width, and apply to an alien who is not in England when the petition is presented. But they must, of course, be taken subject to the effect of the Bankruptcy Act, 1883, s. 6 (d), i. e., of Rule 54, *post*.

⁴ See *Ex parte Pascal*, 1876, 1 Ch. D. (C. A.) 509.

"English Legislature has declared to be an act of bankruptcy, then, by reason of that act of bankruptcy done or suffered in England, he may be made a bankrupt in England."¹

"It was argued," said Mellish, L. J., "that the word 'debtor' must be confined to debtors subject to the laws of England, and that as the appellant was a foreigner [viz., a Portuguese domiciled in Portugal], and had left England before a petition was presented against him, he had ceased to be subject to the laws of England, and no petition could be presented against him. We agree that the word 'debtor' must be construed to mean 'debtor properly subject to the laws of England;' but we are of opinion that it is the act of bankruptcy, and not the petition, which gives jurisdiction to the Court of Bankruptcy, and that if a foreigner comes to England, and contracts debts in England, and commits an act of bankruptcy in England, he thereby gives the Court of Bankruptcy jurisdiction over him,"² *i. e.*, becomes a debtor subject to the English bankruptcy law.³

2. Any debtor who, being a British subject [or (semble) who, being domiciled in England], commits an act of bankruptcy out of England, is a debtor subject to the English bankruptcy law.⁴

It is pretty clear that the word "debtor" includes a British subject who commits an act of bankruptcy out of England. "As regards an Englishman, a subject of the British Crown, it is not necessary," says Cotton, L. J., "that he should be here, if he has done that which the Act of Parliament says shall give jurisdiction, because he is bound by the Act by reason of his being a British subject;"⁵ for "the English Legislature has a right to make a bankruptcy statute which shall bind all its own subjects, and any foreigner who for the time is in England and does something there which the statute forbids."⁶

¹ *Ex parte Blain*, 1879, 12 Ch. D. (C. A.) 522, 528, judgment of Brett, L. J. Such a foreigner could not in general be made a bankrupt under the Bankruptcy Act, 1883, as he would probably not fulfil the requirements of the Bankruptcy Act, 1883, s. 6 (d), embodied in Rule 54, *post*. Still he would be a debtor subject to the English bankruptcy law, and therefore liable to be made a bankrupt if he satisfied the requirements of Rule 54, *e. g.*, by having ordinarily resided in England within a year before the presentation of the petition.

² *Ex parte Crispin*, 1873, L. R. 8 Ch. 374, 379, *per Curiam*. This case was decided under the Bankruptcy Act, 1869. See note 3, p. 288, *ante*, and Rule 54, *post*.

³ Compare Rule 56 as to jurisdiction to make a debtor bankrupt on his own petition.

⁴ *Ex parte Blain*, 1879, 12 Ch. D. (C. A.) 522, 528, 532.

⁵ *Ibid.*, p. 532, judgment of Cotton, L. J.

⁶ *Ibid.*, p. 528, judgment of Brett, L. J.

It appears probable further, though not certain, that the same principle applies to an alien domiciled in England.

"All the authorities," says Brett, L. J., "have held that it is necessary that the act of bankruptcy should have been committed in England if the person against whom the statute is invoked is a foreigner who is not domiciled in England."¹ These words suggest the conclusion that an alien who is domiciled in England is a "debtor," under the Bankruptcy Act, even though the act of bankruptcy is committed in a foreign country.

The terms of Rule 53 are simply negative. The Court has no jurisdiction to adjudicate bankrupt any debtor who is not a debtor subject to the English bankruptcy law within the terms of that Rule. But it is not the case that the Court has jurisdiction to adjudicate bankrupt every debtor who is a debtor subject to the English bankruptcy law.²

Illustration.

X, a Portuguese domiciled in Portugal, contracts debts in England, where he has within a year before the presentation of a bankruptcy petition had a place of business. He is not in England, and has committed an act of bankruptcy out of England. The Court has no jurisdiction.³

RULE 54.⁴ — The Court has no jurisdiction (at any rate on a bankruptcy petition being presented by a creditor) to adjudge bankrupt any debtor unless the debtor either

- (1) at the time of the presentation of the petition is domiciled in England,⁵ or
- (2) within a year before the date of the presentation of the petition has ordinarily resided, or had a dwelling-house or place of business, in England.⁶

¹ *Ex parte Blain*, 1879, 12 Ch. D. (C. A.) 522, 528.

² See especially, Rule 54, and compare *In re Pearson*, [1892] 2 Q. B. (C. A.) 263.

³ *Ex parte Crispin*, 1873, L. R. 8 Ch. 374; *Ex parte Blain*, 1879, 12 Ch. D. (C. A.) 522; *In re Pearson*, [1892] 2 Q. B. (C. A.) 263.

⁴ Bankruptcy Act, 1883, s. 6 (d).

⁵ *Ex parte Cunningham*, 1884, 13 Q. B. D. (C. A.) 418.

⁶ *In re Hecquard*, 1889, 24 Q. B. D. (C. A.) 71, with which compare *Ex parte Breull*, 1880, 16 Ch. D. (C. A.) 484, and *In re Williams*, 1873, L. R. 8 Ch. 690, which are decided under the Bankruptcy Act, 1869 (32 & 33 Vict. cap. 71), s. 59, Bankruptcy Rules, 1870, rr. 17, 61. As to meaning of words

Comment.

A debtor may be made a bankrupt either on the petition of a creditor or on the petition of the debtor himself.¹

The Court has (at any rate on the petition of a creditor²) no bankruptcy jurisdiction over any debtor who, as to local connection with England, does not fulfil one or more of the conditions laid down in Rule 54.³

These conditions may, any or all of them, be fulfilled at the same time. They are, however, entirely distinct, and, as far as Rule 54 goes, the jurisdiction of the Court is not excluded if the debtor fulfils any one of them.

As to domicil and ordinary residence. — The term “domiciled” is in this Rule used in its strict technical sense,⁴ and the burden of proving what is a debtor’s domicil lies *primâ facie* upon the creditor.⁵ The difference between “domicil” and “ordinary residence,” and therefore the meaning of the words “ordinarily resided,” has been already treated of.⁶ It is of great importance, however, to bear in mind that a debtor may be domiciled where he does not reside, and may ordinarily reside where he is not domiciled, and that “ordinary residence”⁷ means more than mere temporary presence in England.⁸

As to dwelling-house. — The word “dwelling-house” is not to be taken in a very strict sense. It includes, for example, rooms which a person has taken as lodgings in a house of which part is retained by his landlord.

The debtor must, however, have *exclusive* possession of the rooms;⁹ and as a person may “ordinarily reside” in England, *e. g.*, at different hotels for a year, without having a dwelling-house there,

“carry on business,” under Mayor’s Court Extension Act, 1857 (20 & 21 Vict. cap. clvii.), s. 12, see *Lewis v. Graham*, 1888, 20 Q. B. D. 780; *Graham v. Lewis*, 1888, 22 Q. B. D. (C. A.) 1.

¹ See Bankruptcy Act, 1883, ss. 5–8, and Rules 55, 56, *post*.

² Compare Rule 56 and comment thereon, p. 297, *post*.

³ Bankruptcy Act, 1883, s. 6 (d).

⁴ *Ex parte Cunningham*, 1884, 13 Q. B. D. (C. A.) 418; *Ex parte Langworthy*, 1887, 3 Times L. R. 544.

⁵ *Ex parte Barne*, 1886, 16 Q. B. D. (C. A.) 522.

⁶ See pp. 244, 245, *ante*.

⁷ *Conf. Bradford v. Young*, 1885, 29 Ch. D. (C. A.) 617, and *In re Patience*, 1885, 29 Ch. D. 976.

⁸ Compare *Ex parte Gutierrez*, 1879, 11 Ch. D. (C. A.) 298, and *In re Hecquard*, 1889, 24 Q. B. D. (C. A.) 71; and see p. 80, note 1, and contrast Rule 80, *Case 1, post*.

⁹ *In re Hecquard*, 1889, 24 Q. B. D. (C. A.) 71.

so he may (it is submitted) have a dwelling-house in England without ordinarily residing there. *X*, for example, is an English nobleman domiciled in France. He has a house of his own in London, and keeps servants in it, so that he can at any moment inhabit it. He has lived there for only three days, or not at all, during a year. He has not during that year "ordinarily resided" in London, but he has, it would seem, had a dwelling-house there.¹

As to place of business. — This, again, is a different thing from a dwelling-house. A man may have a place of business at a hotel if he keeps a room and transacts business there, even though he never sleeps or resides at the hotel;² and possibly, if *X* keeps a place of business in London occupied only by an agent, this may suffice to render *X* in so far liable to the bankruptcy jurisdiction of the Court.³

A distinction between "domicil" and the other kinds of local connection which are conditions of jurisdiction in bankruptcy should be noted. The debtor must possess an English domicil *at the time when the petition is presented*. He must "ordinarily reside," or have a "dwelling-house," etc., not at the time of the presentation of the petition, but at *some period within the year (not, be it observed, for the year) before the date when the petition is presented*. This difference may be thus exemplified: A bankruptcy petition is presented against *X* on the 1st January, 1896. He was domiciled in England up to the 1st July, 1895, but since that date has acquired a French domicil. The Court has no jurisdiction. A petition is presented against *Y* on the 1st January, 1896. At that date he is and has been residing for nearly six months in France, but up to and during June, 1895, he was ordinarily residing in England. In this case the Court has jurisdiction.

The terms of Rule 54, as of the enactment on which it is grounded,⁴ are purely negative. They determine certain cases in which the Court has no jurisdiction; they do not determine the cases in which the Court has jurisdiction.⁵

¹ See *In re Nordenfelt*, [1895] 1 Q. B. (C. A.) 151. Hence it would seem that a man who has never for years actually resided in England may possibly be held to have a dwelling-house there, as where *X*, who has not been in England for five years, keeps his house in London, in which he had once resided, in such a condition as to servants, furniture, etc., that he could at any moment live there. *Ibid.*

² See *In re Hecquard*, 1889, 24 Q. B. D. (C. A.) 71.

³ But see *Ex parte Blain*, 1879, 12 Ch. D. (C. A.) 522.

⁴ Bankruptcy Act, 1883, s. 6, sub-s. 1 (d).

⁵ It was at one time maintained, on very plausible grounds, that the words

Illustrations.

1. *X*'s domicile of origin is Scotch.¹ He has left Scotland, but has not acquired a domicile of choice elsewhere. He owes debts to creditors in England, and is staying for a few days at a hotel in London on his way to France. *A* presents a bankruptcy petition against *X*. The Court has no jurisdiction to adjudge *X* a bankrupt.²

2. *X* is not domiciled in England, but during the whole of 1894 he resides in London. On the 1st January, 1895, he ceases to reside in England and goes and resides in France, and from that date has no place of business in England. On the 2nd January, 1896, *A*, a creditor, presents a bankruptcy petition against *X*. The Court has no jurisdiction.³

3. *X* is not domiciled in England, and has never had a place of business in England. During the whole of the year 1894 he ordinarily resides in London. On the 1st of January, 1895, he ceases to reside in London and settles in France, where he acquires a domicile. During the course of 1895, he occasionally visits London, staying at a hotel or with friends for a few days at a time. On the 2nd January, 1896, *A*, a creditor, presents a bankruptcy petition against *X*. The Court has no jurisdiction.⁴

4. *X* is an Englishman, but is not domiciled in England. He has never been ordinarily resident in England, or had a dwelling-house or place of business there. He is in England for a temporary purpose, and staying for a short time at an hotel in London. He contracts in England a debt to *A* of £1,000. He makes in London a conveyance of his property to a trustee for the benefit of his creditors generally. *A* presents a bankruptcy petition against *X*. The Court has no jurisdiction.⁵

of this enactment "should be read positively as well as negatively, so as to "give the creditor a right to present a petition [i. e., so as to give the Court "jurisdiction] wherever the act of bankruptcy was committed." See *Westlake*, 3rd ed., p. 148. This view is negatived by *In re Pearson*, [1892] 2 Q. D. B. (C. A.) 263. This case shows that *Ex parte Blain*, 1879, 12 Ch. D. (C. A.) 522, applies to the Act of 1883.

¹ See as to domicile of choice and domicile of origin, pp. 99-114, *ante*.

² Compare *Ex parte Cunningham*, 1884, 13 Q. B. D. (C. A.) 418; *In re Hecquard*, 1889, 24 Q. B. D. (C. A.) 71. It is assumed in these illustrations that the debtor has committed an act of bankruptcy in England.

³ *Ibid*.

⁴ *X*, though he has been in England during the year, has not ordinarily resided or had a dwelling-house or place of business in England.

⁵ This appears strictly to follow from the Bankruptcy Act, 1883, s. 6, sub-s. 1 (d). Contrast *Ex parte Pascal*, 1876, 1 Ch. D. (C. A.) 509, decided under the Bankruptcy Act, 1869.

(B) WHERE COURT HAS JURISDICTION.

(a) *On Creditor's Petition.*

RULE 55.¹ — Subject to the effect of Rules 53 and 54, the Court, on a bankruptcy petition being presented by a creditor, has jurisdiction to adjudge bankrupt any debtor (being otherwise liable to be adjudged bankrupt)² who has committed the act of bankruptcy on which the petition is grounded within three months before the presentation of the petition.

The jurisdiction of the Court is not affected

- (1) by the fact that the debt owing to the petitioning creditor was not contracted in England,³ or
- (2) by the absence of the debtor from England at the time of the presentation of the petition,⁴ or
- (3) by the fact that either the creditor or the debtor is an alien.⁵

Comment.

The exercise of the Court's bankruptcy jurisdiction is to a certain extent discretionary. The Court may, on the petition of a creditor or of a debtor, decline to exercise jurisdiction which it undoubtedly possesses. Such refusal, for example, may be based on the ground that the debtor has been made bankrupt in another country,⁶ or

¹ See Bankruptcy Act, 1883, ss. 4, 6, and 20.

² There are other conditions as to the jurisdiction of the Court with which these Rules are not concerned, viz., that the debt owing to the petitioning creditor or creditors must amount to fifty pounds; that it must be a liquidated sum payable immediately or at some future time (see Bankruptcy Act, 1883, s. 6). Nor are these Rules concerned either with the steps which must be taken before a debtor can be adjudged bankrupt (see Bankruptcy Act, 1883, s. 20), or with the question whether proceedings should be taken in the High Court or in a County Court. (Bankruptcy Act, 1883, ss. 92, 99.)

³ See *Baldwin*, 4th ed., p. 30; *Ex parte Pascal*, 1876, 1 Ch. D. (C. A.) 509, 512, 513, judgment of *James*, L. J.

⁴ *Ex parte Crispin*, 1873, L. R. 8 Ch. 374. See Bankruptcy Rules, 1883, r. 148.

⁵ *Ex parte Crispin*, 1873, L. R. 8 Ch. 374.

⁶ *Ex parte Robinson*, 1883, 22 Ch. D. (C. A.) 816. Compare *Ex parte McCulloch*, 1880, 14 Ch. D. (C. A.) 716.

generally on the existence of "any of those equitable considerations which have induced the Court . . . to say that, although the legal requisites to an adjudication were in all respects perfect, it was not equitable that the bankruptcy should proceed."¹ "It is not necessary," says Lord Justice James, "for us to say that in every case the words of [the Bankruptcy Act, 1869], section 8,² 'shall be adjudged bankrupt,'³ make the adjudication so clearly *ex debito justitiæ* that the Court has no discretion in the matter. The Chief Judge has pointed out that, notwithstanding those words, the Court retains its old jurisdiction to refuse to make a man bankrupt for an improper purpose, and to annul an adjudication when the justice and the convenience of the case require it."⁴

The jurisdiction of the Court is, as already pointed out, based, not on the petition, but on the commission of an act of bankruptcy by a debtor subject to the English bankruptcy law.⁵ Some circumstances, therefore, such for example as the place where the debt is contracted, which might *primâ facie* appear to affect the jurisdiction of the Court, are irrelevant. These circumstances are enumerated in clauses 1 to 3 of our Rule.

But though the fact that the debtor or the creditor is an alien does not, if an act of bankruptcy has been committed, affect the jurisdiction of the Court, the nationality, or even the residence, of the debtor may affect the question whether the debtor has committed an act of bankruptcy. Thus the departure from England of an Englishman domiciled in England may be an act of bankruptcy within Rule 58, clause (d), where the departure from England of a foreigner, whether an alien or not, whose home is in a foreign country, would not be an act of bankruptcy.⁶

Illustrations.

1. X, a Portuguese domiciled in Portugal, contracts a debt⁷ to A in England. He commits an act of bankruptcy in England,

¹ *Ex parte McCulloch*, 1880, 14 Ch. D. (C. A.) 716, 719, judgment of Bacon, C. J.

² With which compare Bankruptcy Act, 1883, ss. 7, 8, 20.

³ The actual words are, "the Court shall adjudge the debtor to be bankrupt."

⁴ *Ex parte McCulloch*, 1880, 14 Ch. D. (C. A.) 716, 723, judgment of James, L. J. See *Re Bond*, 1888, 21 Q. B. D. 17; *In re Artola Hermanos*, 1890, 24 Q. B. D. (C. A.) 640; *Ex parte Gibson*, 1865, 34 L. J. (Bankruptcy) 31, 32.

⁵ See pp. 286-290, *ante*.

⁶ See *Ex parte Crispin*, 1873, L. R. 8 Ch. 374. See p. 286, *ante*.

⁷ It is assumed in these illustrations that the debt amounts to at least £50.

where he has been ordinarily resident up to the time of committing the act of bankruptcy. *X* then leaves England for Portugal. *A*, within three months after the commission of the act of bankruptcy by *X*, presents a bankruptcy petition against *X*, grounded on the act of bankruptcy. *X*, at the time when the petition is presented, is resident in Portugal. The Court has jurisdiction to adjudge *X* bankrupt.¹

2. *X* is a Peruvian citizen domiciled in Peru, where he contracts a debt to *A*, an Italian subject. *X* comes to reside in England, and resides there ordinarily for three months. *X* commits an act of bankruptcy in England. *A*, within a year from the time when *X* has ordinarily resided in England, and within three months from the commission of the act of bankruptcy, presents a petition against him grounded on such act. The Court has jurisdiction.²

3. *X*, an Irishman domiciled in Ireland, carries on business at Dublin, and also at Liverpool, where he has a house of business. He commits an act of bankruptcy in England. A bankruptcy petition is immediately presented by a creditor against *X*. The Court has jurisdiction.³

4. *X* is an American citizen, and carries on business as a financial agent. His wife and family reside at Brussels. In November, 1886, *X* takes a room at the Hotel Metropole, Charing Cross. He keeps the room until the time when a bankruptcy petition against him is presented. During the period for which he takes the room he addresses his letters from the hotel, and goes backwards and forwards from the hotel. Under these circumstances *X* ordinarily resides in England. *X* commits an act of bankruptcy in England. *A*, within three months after the commission of the act of bankruptcy, presents a bankruptcy petition. The Court has jurisdiction.⁴

¹ Compare *Ex parte Crispin*, 1873, L. R. 8 Ch. 374.

In *Ex parte Crispin* the Court had no jurisdiction, because under the circumstances there was no evidence of *X* having committed an act of bankruptcy.

² Compare *Ex parte Pascal*, 1876, 1 Ch. D. (C. A.) 509.

In *Ex parte Pascal* the debtor had, perhaps, not been ordinarily residing in England. The case was decided under the Bankruptcy Act, 1879, and (semble) would, under the circumstances, have been otherwise decided if it had come under the Bankruptcy Act, 1883. It, however, distinctly decides that the fact of the parties being aliens does not affect the jurisdiction of the Court.

³ *Ex parte McCulloch*, 1880, 14 Ch. D. (C. A.) 716.

⁴ In *re Norris*, 1888, 4 Times L. R. 452. Whether *X*'s room at the hotel also constitutes a place of business depends upon the way in which it is used.

(b) On Debtor's Petition.

RULE 56.¹ — The Court has, on a bankruptcy petition being presented by a debtor, alleging that the debtor is unable to pay his debts, jurisdiction to adjudge the debtor bankrupt.

Comment.

It will be observed that in this Rule no reference is made to the restrictions on the jurisdiction of the Court which are stated in Rules 52 to 54.² The omission is intentional.

A debtor who presents a bankruptcy petition against himself *ipso facto* commits an act of bankruptcy,³ and commits it in England.⁴ The requirements, therefore, of Rules 52 and 53 are necessarily satisfied, or, in other words, the restrictions on the jurisdiction of the Court contained in these Rules cannot apply.

Rule 54 applies (it is conceived) only to the case where a debtor is to be made bankrupt on the petition of a creditor. The jurisdiction, therefore, of the Court to adjudge a debtor bankrupt on his own petition is unaffected by the restrictions stated in that Rule, or, to put the same thing in other words, the Bankruptcy Act, 1883, s. 6, sub-s. 1 (d), on which Rule 54 is grounded, applies only where a debtor is to be made bankrupt on a creditor's petition. If this view of the bankruptcy law be correct, the Court has, in strictness, jurisdiction to make any debtor bankrupt on his own petition. The Court, however, may, and no doubt would, decline to exercise this jurisdiction whenever it would work injustice, and the absence of all local connection with England on the part of a petitioning creditor would be a strong reason for the Court's refusing, on grounds of equity and fairness, to make him bankrupt.⁵

¹ Bankruptcy Act, 1883, ss. 5, 8, 20.

² See pp. 285-290, *ante*.

³ See Rule 58, clause (f), p. 300, *post*.

⁴ See p. 288, *ante*.

⁵ It has been suggested, however, by Mr. Westlake that the jurisdiction of the Court is subject, when a petition is presented by a debtor, to the same limitations which are imposed on the Court under the Bankruptcy Act, 1883, s. 6, sub-s. 1 (d), when a petition is presented by a creditor. "As conditions for the commencement of proceedings by a creditor, they express the legislator's view of the debtors who ought to be subject to bankruptcy in England in the interest of creditors; and it would be difficult to show that a debtor who is

Illustrations.

1. *X*, an Englishman domiciled in England, incurs debt in France, and presents a petition alleging that he is unable to pay his debts. The Court has jurisdiction to adjudge *X* a bankrupt.¹

2. *X* is a British subject domiciled at Melbourne, Australia. He has at no time been ordinarily resident or had a dwelling-house or place of business in England. He has incurred debts both in Australia and in England. *X* presents a petition alleging that he is unable to pay his debts. Whether the Court has jurisdiction to adjudge *X* a bankrupt?² *Semble*, the Court has jurisdiction, but may refuse to exercise it.

RULE 57.³—The jurisdiction of the Court to adjudge bankrupt a debtor on the petition of a creditor, or on the petition of the debtor, is not taken away by the fact of the debtor being already adjudged bankrupt by the Court of a foreign country, whether such country do or do not form part of the British dominions.

Comment.

A debtor's bankruptcy, under the law of a foreign country, does not deprive the English Court of jurisdiction to adjudge him a bankrupt. But the fact of his having been made bankrupt in a foreign country (*e. g.*, Scotland or France) may be a reason against the Court's exercising its jurisdiction. Thus, where the debtor had already been made bankrupt in Scotland, the law was

"neither domiciled in this country, nor within the past year has ordinarily resided or had a dwelling-house or place of business in it, has any claim on his own account to what may be the benefit of an English bankruptcy. In previous stages through which the English bankrupt laws have passed, it has been possible for debtors who have not fallen within the above conditions to be adjudicated bankrupt; but it may fairly be presumed that, if in 1883 Parliament had intended the continuance of any such possibility, it would have enabled a creditor to avail himself of it." (*Westlake*, 3rd ed., p. 148.)

This reasoning, though forcible, is not conclusive, and it is safest to avoid a system of interpretation which on general grounds reads into an Act of Parliament limitations not to be found in the words of the statute. Compare *Ex parte Painter*, [1895] 1 Q. B. 85.

¹ Bankruptcy Act, 1883, ss. 5, 8.

² But see *Westlake*, p. 148.

³ *Ex parte McCulloch*, 1880, 14 Ch. D. (C. A.) 716; *Ex parte Robinson*, 1883, 22 Ch. D. (C. A.) 816; *In re Artola Hermanos*, 1890, 24 Q. B. D. (C. A.) 640.

laid down as follows: "About the jurisdiction to make an adjudication I have no doubt; *Ex parte McCulloch*¹ settles that. Of course there must be some reason for exercising it, and the mere existence of a bankruptcy in Scotland or in Ireland would, *prima facie*, be a reason for not exercising it. Here the Scotch sequestration is not closed; it does not appear that there are any subsequent debts, or any assets in England, and there is no reason for exercising the jurisdiction. . . . There ought not to be an adjudication."²

Illustrations.

1. *A* carries on business at Monaghan in Ireland and at Liverpool in England. On the 3rd May a bankruptcy petition is presented against him in England. On the 4th May he is adjudicated bankrupt on his own petition in Ireland. On the 5th May the English Court has jurisdiction to adjudicate him bankrupt in England though the Irish bankruptcy is known to and brought before the attention of the Court.³

2. July 27, 1881, there is an unclosed sequestration against *X* in Scotland. In 1882 *A* in England presents a bankruptcy petition against *X*. The Court has jurisdiction to adjudge *X* bankrupt, though it is a matter of discretion whether the Court shall or shall not exercise its jurisdiction.⁴

(C) WHAT ACTS ARE ACTS OF BANKRUPTCY.

RULE 58.⁵—A debtor commits an act of bankruptcy in each of the following cases [and in no other case]:—

- (a) If, in England, or *elsewhere*, he makes a conveyance or assignment of [the whole of⁶] his property to a trustee or trustees for the benefit of his creditors generally.

¹ 1880, 14 Ch. D. (C. A.) 716.

² *Ex parte Robinson*, 1883, 22 Ch. D. (C. A.) 816, 818, per *Jessell*, M. R.

³ *Ex parte McCulloch*, 1880, 14 Ch. D. (C. A.) 716. Though the English Court has jurisdiction, *X*'s whole assets have already vested in the assignee under the Irish bankruptcy. See Rules 106, 110, *post*.

⁴ *Ex parte Robinson*, 1883, 22 Ch. D. (C. A.) 816.

⁵ This Rule follows in substance the words of the Bankruptcy Act, 1883 (46 & 47 Vict. cap. 52), s. 4, as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. cap. 71), s. 1. The words in brackets are added. The meaning of the term, "the Court," as interpreted in Rule 52, p. 285, *ante*, should be borne in mind.

⁶ See *Ex parte Crispin*, 1873, L. R. 8 Ch. 374; and *Baldwin*, p. 45.

- (b) If, in England, or *elsewhere*, he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof.
- (c) If, in England, or *elsewhere*, he makes any conveyance or transfer of his property, or any part thereof, or creates any charge thereon, which would [under any Act of Parliament¹] be void as a fraudulent preference if he were adjudged bankrupt.
- (d) If, with intent to defeat or delay his creditors, he does any of the following things, namely, departs out of England, or, being out of England, remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house.
- (e) If execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days.
- (f) If he files in the Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself.
- (g) If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him in England, or by leave of the Court elsewhere, a bankruptcy notice under the Bankruptcy Act, 1883, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either

¹ The words of Bankruptcy Act, 1883, are, "this or any other Act."

comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained.

Any person who is for the time being entitled to enforce a final judgment is to be deemed a creditor who has obtained a final judgment within the meaning of this Rule.

- (h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.¹

Comment.

Every act which can constitute an act of bankruptcy is enumerated in this Rule.

For the determination whether a given transaction does constitute an act of bankruptcy within this Rule, the following general considerations are of importance:—

1. Any transaction which is to constitute an act of bankruptcy must, unless the contrary is apparent from the terms of this Rule, have occurred in *England*.²

2. Of the acts of bankruptcy enumerated in this Rule, some, *e. g.*, those included in clauses (a), (b), and (c), can be committed either in England or in any other country; others, *e. g.*, those included in clauses (e) and (f), must be committed in England; and some, it would seem, must, as to part of the transaction constituting the act of bankruptcy, be committed in England, but may, as to other portions of it, be committed out of England. Such would appear to be the case as to some at any rate of the acts included in clauses (d) and (g).

3. The dealings with a debtor's property which constitute an act of bankruptcy under clauses (a), (b), and (c) may take place either in England "or elsewhere." But it has been suggested or laid down by very high authority that a conveyance, or the like,

¹ See the Bankruptcy Act, 1883, s. 4, sub-s. 1 (h); *In re Crook*, 1890, 24 Q. B. D. (C. A.) 320; *Crook v. Morley*, [1891] A. C. 316.

² Compare *Baldwin*, 4th ed., p. 45, citing *Ingliss v. Grant*, 1794, 5 T. R. 530.

made out of England must, if it is to be an act of bankruptcy, be a conveyance "which is to operate according to English law."¹

To this suggested proviso or limitation it is hard to attach a very definite meaning. The proviso is (it is conceived) intended to exclude from the character of acts of bankruptcy acts done abroad by a foreigner not domiciled in England, and not intended to operate at all according to English law, *i. e.*, not intended to have any effect on property in England.²

4. Whether a debtor does or does not commit an act of bankruptcy under clause (d), *e. g.*, by departing out of England or remaining out of England, may depend upon the answer to the question whether he is or is not an Englishman living in England; for the words of the clause "imply that the person who remains "out of England has his home or place of business in England, "and cannot reasonably be held to apply to the case of a foreigner "remaining in his own home."³

5. An act of bankruptcy must be a personal act or default, and it cannot be committed through an agent unless the agent is authorised to do the particular act, nor by a firm as such.⁴ Thus *X* is a Chilian subject, who has never been in England, but he is a member of an English firm which trades and contracts debts in England. An action is brought against the firm, judgment is obtained, and execution is issued, under which the goods of the

¹ See *Ex parte Crispin*, 1873, L. R. 8 Ch. 374, 380, judgment of Court delivered by *Mellish*, L. J.

² "The words," writes Mr. Baldwin, "'or elsewhere' are intended to include the case of a deed executed abroad by a domiciled Englishman relating "to property here, and intended to operate according to English law; they "have no application to a conveyance executed by a domiciled foreigner in his "own country." (*Baldwin*, p. 49, citing *Ex parte Crispin*, 1873, L. R. 8 Ch. 374.) But this statement of the law may possibly be a little too narrow. *X* is a Frenchman domiciled in France, but ordinarily resident in England; he possesses a large amount of goods in both countries. He executes at Paris a conveyance of all his property to *A* on behalf of his creditors. Has *X* committed an act of bankruptcy? If he has, Mr. Baldwin's language is too narrow. Suppose, again, that *X*, a Frenchman domiciled in France, but ordinarily resident in England, has real and personal property in England, but none in France. *X* at Paris executes a conveyance to *A* of all his property for the benefit of *X*'s creditors. It would be difficult to contend that this is not an act of bankruptcy committed elsewhere than in England, yet it is not an act of bankruptcy within Mr. Baldwin's statement of the law.

³ *Ex parte Crispin*, 1873, L. R. 8 Ch. 374, 380, judgment of Court delivered by *Mellish*, L. J. The word "foreigner" covers both an alien and a person who, though not an alien, belongs to any other country than England, *e. g.*, a Canadian.

⁴ *Ex parte Blain*, 1879, 12 Ch. D. (C. A.) 522.

firm are seized and sold. The seizure and sale of the goods is not an act of bankruptcy on the part of *X*.¹

II. WINDING-UP OF COMPANIES.²

(A) WHERE COURT HAS NO JURISDICTION.

RULE 59. — The Court has no jurisdiction to wind up —

- (1) Any company registered in Scotland or in Ireland ;³
- (2) Any unregistered company having a principal place of business situate in Scotland or in Ireland, but not having a principal place of business situate in England ;⁴
- (3) Any unregistered foreign company which, though carrying on business in England, has no office in England ;⁵
- (4) Any unregistered company which does not fall within the Companies Act, 1862.⁶

The term “the Court,” in this Rule and in Rule 60, means any Court in England having jurisdiction to wind up a company under the Companies Act, 1862, and the Acts amending the same, and includes the High Court and any other Court in England having such jurisdiction.⁷

¹ *Ex parte Blain*, 1879, 12 Ch. D. (C. A.) 522.

² *Lindley, Company Law*, 5th ed., 615–623, and Supplement, pp. 18–20; *Westlake*, 3rd ed., 151, 152; *Nelson*, 240, 241; Companies Act, 1862 (25 & 26 Vict. cap. 89), ss. 81, 199; and Companies (Winding-up) Act, 1890 (53 & 54 Vict. cap. 63), s. 1.

³ Compare Companies Act, 1862, s. 81, which is repealed only as to England and Wales, and Companies (Winding-up) Act, 1890, s. 1.

⁴ Companies Act, 1862, s. 199, sub-s. 1. Note s. 199 for the definition of an “unregistered company,” which means, speaking generally, any partnership, association, or company not registered under the Companies Act, 1862, and includes a foreign company formed under a foreign law (see *Reuss v. Bos*, 1871, L. R. 5 H. L. 176; *In re Lloyd Generale Italiano*, 1885, 29 Ch. D. 219), and further for the fact that a company may simultaneously have principal places of business in more than one part of the United Kingdom, *e. g.*, both in England and in Scotland.

⁵ *In re Lloyd Generale Italiano*, 1885, 29 Ch. D. 219, 220.

⁶ See *Lindley, Company Law*, 5th ed., pp. 620–623.

⁷ See Companies Act, 1890, s. 1. All the English Courts having jurisdiction to wind up a company are, for the purpose of these Rules, treated as if they were one Court.

Comment.

1. *Registered in Scotland, etc.* — A company cannot be registered in more than one part of the United Kingdom, and jurisdiction to wind up a company registered in Scotland or in Ireland is given by the Companies Act to the proper Irish and Scotch Court exclusively.¹

2. *Unregistered. — Principal place of business in Scotland, etc.* — An unregistered company is to be wound up in that part of the United Kingdom where its principal place of business is situate. Hence a company which has not its principal place of business in England, but has its principal place of business, *e. g.*, in Scotland, must be wound up by the Scotch Court. But a company may have a “principal place of business” at the same time in more than one part of the United Kingdom, *e. g.*, both in England and in Scotland. In this case the proper English and Scotch Court respectively have each jurisdiction to wind up the company.²

3. *Unregistered. — Foreign company without office, etc.* — A foreign unregistered company may carry on business in England through agents without having any English office of its own. In this case the Court has no jurisdiction to wind it up.

“The jurisdiction,” says Pearson, J., “to wind up a company “is a purely statutory one under the Companies Acts. . . . I am “decidedly of opinion that the Act is confined to English companies, and foreign companies carrying on business in England “with, so to speak, a residence of their own — a branch office — “in this country. In the cases which have been cited³ of orders “made to wind up foreign companies, the companies had an office “in England, but that is not so in the present case. I have no “jurisdiction at all.”⁴

4. *Unregistered. — Company not within Companies Act, 1862.* — “The 199th section of the Companies Act, 1862, is expressed “in terms sufficiently large to include all unregistered societies “and corporations of whatever kind consisting of more than seven “members at the date of the petition, with the single exception of “railway companies incorporated by Act of Parliament. But the

¹ Companies Act, 1862, s. 81.

² See Rule 60, *post*, and Companies Act, 1862, s. 199, sub-s. 1.

³ *Viz., In re Commercial Bank of India*, 1868, L. R. 6 Eq. 517; *In re Matheson*, 1884, 27 Ch. D. 225; *Reuss v. Bos*, 1871, L. R. 5 H. L. 176.

⁴ *In re Lloyd Generale Italiano*, 1885, 29 Ch. D. 219–221, judgment of Pearson, J.

"general scope of the Winding-up Acts shows that there are corporations aggregate to which the winding-up provisions of the Companies Act, 1862, have no application; *e. g.*, municipal corporations, ecclesiastical corporations aggregate, and societies such as the Royal Society, incorporated by royal charter for the "advancement of science."¹ So, again, the Winding-up Acts do not apply to ordinary clubs,² and the Court has no jurisdiction to wind up corporations or societies which do not come within the scope of the Winding-up Acts.

Illustrations.

1. *X* is a Scotch banking company having an office and registered in Scotland, but also having an office in London and carrying on a large business in England. The Court has no jurisdiction to wind up the company.

2. *X* is an unregistered company having a principal place of business in Edinburgh and a subordinate place of business in London. The Court has no jurisdiction to wind up the company.³

3. *X* is a *société anonyme* for the carrying on of marine insurance. It is established at Genoa, and is authorised by a decree of the King of Italy. It is not registered under the Companies Act, 1862. It carries on business in Italy and also in England. The business in England is carried on by means of agents, and *X* has no branch office of its own in England. The Court has no jurisdiction to wind up the company.⁴

4. *X* is an ordinary club. The Court has no jurisdiction to wind it up.

(B) WHERE COURT HAS JURISDICTION.

RULE 60.⁵—Subject to the effect of Rule 59, the Court has jurisdiction to wind up—

(1) Any company registered in England;⁶

¹ *Lindley, Company Law*, 5th ed., p. 620.

² *Ibid.*

³ Companies Act, 1862, s. 199, sub-s. 1.

⁴ *In re Lloyd Generale Italiano*, 1885, 29 Ch. D. 219.

⁵ *Lindley, Company Law*, 5th ed., p. 617; Companies Act, 1862, ss. 79, 180, 196, 199.

⁶ *Reuss v. Bos*, 1871, L. R. 5 H. L. 176.

- (2) Any unregistered company having a principal place of business¹ or a branch office² in England.

Comment.

There are two classes of companies which, subject to certain limited exceptions, the Court has jurisdiction to wind up.

1. *Registered in England.*—The Court has jurisdiction to wind up a company registered in England, whether it be an English or a foreign company. The jurisdiction is not taken away by the fact that the company is formed to carry on business abroad, nor by the fact of its consisting of foreigners, nor by the consideration that the registrar might have rightly declined to register the company.³ A company, moreover, which is capable of being registered at all, may be registered for the sole purpose of being wound up.⁴

2. *Unregistered and having a principal place of business, etc.*—An unregistered company which has a principal place of business in England is, though it may also have another principal place of business in Scotland or in Ireland, precisely within the terms of the Companies Act, 1862, s. 199, sub-s. 1, and the Court clearly has jurisdiction to wind it up.

Foreign companies not registered under the Act have been held to be within the provisions of the Companies Act, 1862, as to the winding-up of unregistered companies,⁵ and may be wound up by the Court if they possess branch offices of their own in England.

“A company formed and registered abroad, and having a branch office in this country, but not registered here, may be ordered to be wound up under the Companies Act, 1862; and the fact that steps are being taken to wind up the company in the country in which the company is registered does not affect the jurisdiction of the English Court. But the writer apprehends that it is not competent for any Court in this country to dissolve a corporate body created by a competent foreign authority; and a foreign corporation, therefore, cannot be wholly wound up and dissolved in this country. At the same time, if a foreign incor-

¹ The Companies Act, 1862, s. 199.

² *In re Commercial Bank of India*, 1868, L. R. 6 Eq. 517; *In re Matheson*, 1884, 27 Ch. D. 225.

³ *Reuss v. Bos*, 1871, L. R. 5 H. L. 176.

⁴ *Lindley, Company Law*, p. 617.

⁵ See *In re Matheson*, 1884, 27 Ch. D. 225; *In re Commercial Bank of South Australia*, 1886, 33 Ch. D. 174.

“porated company were registered, the corporate body created by registration might be wound up and dissolved without any undue exercise of jurisdiction.”¹

Where the jurisdiction to wind up a company exists, the exercise thereof is to a certain extent a matter of discretion, and the fact that an unregistered foreign company with a branch office here is being wound up in the foreign country, under the law of which it is constituted, may be a reason against winding it up here.

Illustrations.

1. *X* is a company duly registered in England under the Companies Act, 1862. The subscribers to the articles of association are all foreigners resident abroad. The objects of the company are mainly the transaction of business abroad, and the company has in fact carried on little or no business in England. The Court has jurisdiction to wind up the company.²

2. *X* is a company formed for making a railway in Spain, and has a board of directors in Madrid and in London; the *locale* of the company is to be Spain, and its affairs are to be regulated by Spanish law. It is registered in England. The Court has jurisdiction to wind up the company.³

3. *X* is an unregistered company having a principal place of business in London. The Court has jurisdiction to wind up the company.⁴

4. *X* is an unregistered company, having a principal place of business both in Edinburgh and in London. The Court has jurisdiction to wind up the company.⁵

5. An Anglo-Belgian company is constituted a *société anonyme*, with domicile at Brussels and a board of directors there and in London, where it has a branch office. The object of the company is to make a railway in Belgium. The Court has jurisdiction to wind up the company.⁶

6. *X* is a joint-stock company formed in India and incorporated by registration under Indian law. It has a principal place of

¹ *Lindley, Company Law*, 5th ed., pp. 622, 623.

² *In re General Co. for Promotion of Land Credit*, 1870, L. R. 5 Ch. 363; *Reuss v. Bos*, 1871, L. R. 5 H. L. 176.

³ *In re Madrid &c. Co.*, 1849, 19 L. J. Ch. 260; 3 De G. & Sm. 127; *Re the Factage Parisien*, 1864, 34 L. J. Ch. 140.

⁴ Companies Act, 1862 (25 & 26 Vict. cap. 89), s. 199.

⁵ *Ibid.*

⁶ Suggested by *Re Dendre Valley Co.*, 1850, 19 L. J. (Ch.) 474.

business in India, but has a branch office and agent in England. The Court has jurisdiction to wind up the company.¹

7. *X* is an unregistered joint-stock company, formed and having its principal place of business in New Zealand, but has a branch office, agent, assets, and liabilities in England. The Court has jurisdiction to wind up the company.²

8. *X* is a banking company incorporated and carrying on business in Australia, and is not registered in England, but has a branch office in London. The company has English creditors and assets in England. The Court has jurisdiction to wind up the company.³

¹ *In re Commercial Bank of India*, 1868, L. R. 6 Eq. 517.

² *In re Matheson*, 1884, 27 Ch. D. 225.

³ *In re Commercial Bank of South Australia*, 1886, 33 Ch. D. 174.

AMERICAN NOTES.

CHAPTER VIII.

JURISDICTION IN BANKRUPTCY AND IN REGARD TO WINDING-UP OF COMPANIES.

1. NATIONAL BANKRUPTCY ACTS.—Congress has passed three bankrupt acts: (1) In 1800, repealed in 1803; (2) 1841, repealed in 1843; (3) 1867, amended in 1874, and repealed in 1878. By the acts of 1841 and 1867, any person residing within the jurisdiction of the United States might petition to be declared a bankrupt, including a resident alien. *In re Goodfellow*, 1 Lowell, 510; 3 B. R. 452. See *Cutter v. Folsom*, 17 N. H. 139. The term "residence" was in one court held (following the construction given to the same term in the Massachusetts insolvent law) to signify domicile. *In re Walker*, 1 Lowell, 237; 1 B. R. 386; *In re Goodfellow*, 1 Lowell, 510; 3 B. R. 452. *Contra*, *In re Watson*, 4 B. R. 613. On the other hand, any person residing within the jurisdiction of the United States, and being insolvent, who had committed one of certain acts of bankruptcy, might be declared to be a bankrupt involuntarily. Rev. Stats. of U. S. s. 5021; *Doan v. Compton*, 2 B. R. 607.

Under the Act of 1867, the title of the bankrupt to his property was not divested by the adjudication of bankruptcy, but was divested and transferred to the assignee by the execution and delivery of the assignment. *Hampton v. Rouse*, 11 B. R. 472. The assignment conveyed to the assignee "all the estate, real or personal, of the bankrupt" (Rev. Stats. s. 5044), with certain exemptions. Rev. Stats. s. 5045. *Lathrop v. Drake*, 91 U. S. 516. See *In re Vetterlein*, 44 Fed. Rep. 57. See as to the term "estate," *In re Hambright*, 2 B. R. 498; *Comegys v. Vasse*, 1 Pet. 193.

A bankrupt assignment does not vest in the assignee title to real estate in a foreign country. *Oakey v. Bennett*, 11 How. 33; *Barnett v. Pool*, 23 Tex. 517; *Harvey v. Edens*, 69 Tex. 420.

2. STATE BANKRUPTCY AND INSOLVENCY LAWS.—The state statutes relating to insolvent debtors, though generally termed insolvent laws, are often in effect bankrupt laws, and are operative as such in the absence of legislation by Congress on the same subject. See *Boese v. King*, 108 U. S. 379. The term "insolvent law" is, therefore, here used in the sense of a bankrupt law. The test as to whether a law is an insolvent law is whether it is intended to relieve a debtor from his contracts, *Cole v. Cunningham*, 133 U. S. 107; 10 Sup. Ct. 269; *Boese v. King*, 108 U. S. 379; *Lyman v. Bond*, 130 Mass. 291; or is coercive in its nature, *Barth v. Backus*, 140 N. Y. 230; *Townsend v. Coxe* (Ill.), 37 N. E. 689. Usually proceedings may be taken either by or against a resident or domiciled debtor, and in some cases the statutes provide for proceedings against non-resident debtors holding real or personal property within the State. *Chipman v. Peabody*, 159 Mass. 420; 34 N. E. 563. The

operation, however, of a state insolvent law, though its object may be to reach all the property of the debtor, whether such property is within or without the commonwealth, is greatly circumscribed. It cannot of itself operate on property in another State; and, while it may operate upon contracts made within the State between citizens thereof, it cannot operate upon contracts made within the State between a citizen of the State and a citizen of another State, or upon contracts not made within the State, *Baldwin v. Hale*, 1 Wall. 223; *Brown v. Smart*, 145 U. S. 454, 457; 12 Sup. Ct. Rep. 958; unless the creditor voluntarily becomes a party to the proceedings, *Cole v. Cunningham*, 133 U. S. 107, 114; 10 Sup. Ct. Rep. 269. See, however, *Gilman v. Lockwood*, 4 Wall. 409, 410. But a court of equity in the State in which insolvency proceedings are pending may enjoin one of its citizens from pursuing an attachment against the property of the insolvent in another State. *Cole v. Cunningham*, 133 U. S. 107; 10 Sup. Ct. Rep. 269. A state law declaring void an assignment, with preferences of property in the State, by an insolvent citizen of the State, four months before the commencement of proceedings in insolvency, is valid as against creditors who are citizens of other States. *Brown v. Smart*, 145 U. S. 454; 12 Sup. Ct. Rep. 958. See *Owens v. Roberts*, 81 Me. 439; 17 Atl. 403.

See American Notes under chaps. x. and xvii.

CHAPTER IX.

JURISDICTION IN MATTERS OF ADMINISTRATION AND SUCCESSION.

RULE 61. — In this Digest, unless the context or subject-matter otherwise requires,

(1) “Personal property”¹ or “personal estate”² includes : —

(i) any land (immovable) in which a person has less than a freehold interest (chattel real), and any land which, though not a chattel real, is by a rule of law treated as personalty;³

(ii) any goods (movables which can be touched);

(iii) any chose in action or debt (movable which cannot be touched).

(2) “Administrator” includes an executor.

(3) “Personal representative” includes an administrator, and also any person who, however designated, is under the law of any country entitled in such country to represent a deceased person, and, as his representative, to deal with the movables of the deceased.

¹ See as to division of property into immovables and movables, and as to its relation to the division into realty and personalty, pp. 65, 71–73, *ante*.

² These terms may be considered as equivalent to each other. It is convenient to make use in this Digest of both expressions, since each is used in Acts of Parliament, the language of which it is desirable to follow.

³ See *Forbes v. Steven*, 1870, L. R. 10 Eq. 178; *Attorney-General v. Marquis of Ailesbury*, 1887, 12 App. Cas. 672; *Attorney-General v. Lomas*, 1873, L. R. 9 Ex. 29; *In Goods of Gunn*, 1884, 9 P. D. 242; *Attorney-General v. Hubbuck*, 1884, 13 Q. B. D. (C. A.) 275; *Attorney-General v. Brunning*, 1860, 8 H. L. C. 243. Contrast *In Goods of Lloyd*, 1884, 9 P. D. 65.

- (4) "Foreign personal representative" means the personal representative of the deceased under the law of a foreign country.
- (5) "Administration" means the dealing according to law with the property of a deceased person by a personal representative.
- (6) "Succession" means beneficial succession to the property of a deceased person.
- (7) "Grant" means a grant of letters of administration, or of probate of a will.
- (8) "English grant" means a grant made by the Court.
- (9) "Assets" means such personal property of a deceased person as an administrator who has obtained an English grant is bound to account for or is chargeable with.

Comment.

(1) *Personal property*. — The division of property, or, in strictness, of the subjects of property, which is generally followed in this Digest, is the division into immovables and movables. With the different division of property followed by English lawyers into real property and personal property, we need not, for the purpose of this treatise, in general, concern ourselves. In some, however, of the Rules in this Digest, and especially in those Rules which refer to the jurisdiction of the High Court in matters of administration, it is necessary or convenient to keep in view the division adopted by English law, and therefore to employ the term "personal property" or "personal estate."¹

(i) *Land, etc.* — Personal property includes land (immovables) of two different descriptions. In the first place, it includes land in which a person has less than a freehold interest, *e. g.*, a leasehold. Such land, or, in strictness, the interest in it, is a chattel real. It includes, in the second place, land which, though not a chattel real, is by any rule of law treated as personalty, or, in other words, made subject to the incidents of personal property. Such, for example, is land which under a rule of equity is,

¹ For the relation between the division into immovables and movables, and the division into realty and personalty, or, what is the same thing, into real property and personal property, see pp. 71-73, *ante*.

as the expression goes, "converted into personalty," as where freehold property is under a settlement conveyed to trustees in trust to sell the same, and after the death of *A* to stand possessed of the proceeds of the sale for the purposes of the trust.¹

(ii) *Goods*.—Personal property includes all goods,² that is to say, tangible movables, *e. g.*, money, horses, furniture, and the like.

(iii) *Chose in action*.—Personal property includes every kind of chose in action, using that term in its very widest sense. It includes, that is to say, every movable which cannot be touched, or intangible movable. Thus it includes "debts," in the strict sense of the term, and also everything (not an immovable) which can be made the object of a legal claim, as, for example, a person's share in a partnership property.

(2) *Administrator*.—Under English law, the representative of a deceased person, in respect of his personal property, is always either an "administrator," *i. e.*, a person entitled to represent an intestate (or at any rate a deceased person who is not represented by an executor), or an "executor," *i. e.*, a person appointed by the will of a testator to represent him in respect of his personal property, and to deal with such property in accordance with the terms of the will. Thus, according to the usual terminology of English law, an "administrator," in the technical sense of the term, is opposed to an "executor." For the purposes of this Digest, however, it is convenient to make the term "administrator" include an executor, and thus to give it a somewhat wider sense than it usually receives in English law books.

(3) *Personal representative*.—The term "personal representative" is here used in a very wide sense; it includes a person who, under any legal system, represents an intestate, or a testator, in regard to his movable property.

As applied, however, to England, it is equivalent to an administrator in the sense given to that term in these Rules.

(5) *Administration*, (6) *Succession*.³—The terms "administration" and "succession" are purposely so defined as to be applicable to foreign countries (*e. g.*, to France) no less than to England. The two things are essentially different, for the one means the dealing with a deceased person's property according to law, the other the succeeding to it beneficially. And English

¹ See *In Goods of Gunn*, 1884, 9 P. D. 242; *Attorney-General v. Marquis of Ailesbury*, 1887, 12 App. Cas. 672; *Forbes v. Steven*, 1870, L. R. 10 Eq. 178.

² With slight exceptions, as, for example, title-deeds.

³ Only those terms in Rule 61 are commented upon which need explanation.

law, in common with the systems which follow the law of England, emphasises the distinction between administration and beneficial succession.

"Administration"¹ means in England the dealing according to law with the personal property of an intestate, or testator, by the person who has authority under English law so to deal with it.

Immediately on the owner's death, a deceased person's personal property vests, if he dies intestate, in the judge of the Probate Division of the High Court,² and, if he dies having made a will appointing an executor, then in his executor. And though an executor's rights are derived from the will, and he at once has wide powers³ of dealing with the deceased's property, no one can fully represent the deceased, or has a right in all respects to deal with his personal property, who has not obtained authority to do so from the Court. If the deceased dies intestate,⁴ the necessary authority is acquired by the proper person (*e. g.*, the intestate's next of kin) obtaining from the Court a grant of letters of administration. If the deceased has made a will appointing an executor who consents to act, then the necessary authority is acquired by the executor obtaining from the Court probate of the will.⁵ The duty of an administrator, including in that term an executor, is, it should be even here remarked, to pay the duties and debts due

¹ As to some ambiguities of the word "administration," see language of Lord Selborne in *Ewing v. Orr Ewing*, 1885, 10 App. Cas. 453, 504. Note further that the word "administration" is often used by English lawyers in a narrower sense as meaning the action or office of an "administrator," *i. e.*, of the personal representative, under English law, of an intestate.

² Court of Probate Act, 1858 (21 & 22 Vict. cap. 95), s. 19. "From and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the judge of the Court of Probate for the time being, in the same manner and to the same extent as heretofore they vested in the ordinary."

³ See *Walker & Elgood*, pp. 136-141.

⁴ Or, having made a will, has either appointed no executor, or has appointed an executor who declines to act.

⁵ See *Williams, Executors*, 9th ed., p. 236. There is, of course, the difference that the authority of an administrator, in the restricted sense of the term, depends strictly on his having obtained letters of administration, whilst the authority of an executor depends ultimately, not upon his having obtained probate, but upon his appointment under the will; the probate is rather the recognition of an executor's authority than the conferring of it. But this distinction is for our present purpose unimportant. No one, whether administrator or executor, can fully represent the deceased until he has obtained the authority or sanction of the Court by a grant, as the case may be, either of administration or of probate. Note, too, the necessity for taking out probate, etc., under the Stamp Act, 1815 (55 Geo. III. cap. 184), s. 37.

from the personal property of the deceased intestate or testator, and, having done this, or, to use a popular expression, having "cleared" the estate, to hand over the residue to the person or persons entitled to succeed to it according to law.

"Succession" means the succeeding beneficially to the property of a deceased person, and when the property is personal property succession means, under the law of England, the succeeding, not to the whole property left by the deceased, but to the distributable residue thereof, *i. e.*, to the portion which remains in the hands of the administrator after the estate has been cleared.

But, under English law, though administration is kept absolutely distinct from succession, there can be no succession to personal property without administration; for the possibility of dealing fully and legally with the personal property of an intestate or testator depends, as already pointed out, upon some one having obtained from the Court, in the form either of letters of administration or of probate, authority to deal with the property according to law, or, in other words, to administer it.

(7) *Grant*, (8) *English grant*. — The Court, as already pointed out, where the deceased person dies intestate, grants letters of administration, and, where he has made a will and appointed an executor who acts, grants probate. The word "grant," as used in these Rules, includes a grant of either kind. The expression "English grant," which is not a technical one, is used only for the sake of brevity, and to distinguish a grant made by the Court from a grant of administration or probate made by some foreign Court.

A grant is, in the usual course of things, made by the Court as the result of proceedings which are non-contentious, or, as they are technically called, in "common form."¹ But if the right to represent an intestate or testator is, or may be, disputed, it becomes the subject of an action, called a "probate action," and a grant is made by the Court as a result of such action.²

¹ See *Tristram & Coote*, 11th ed., pp. 1-253.

² A "probate action" (see R. S. C. Ord. LXXI. r. 1) is either (i) an action for determining which of two claimants is entitled to a grant of letters of administration; or (ii) for proving wills in solemn form of law; or (iii) for the revocation of probates or letters of administration. Compare *Tristram & Coote*, pp. 366-368, where the term "probate action" is used in rather a narrower sense. A probate action, which was formerly brought in the Court of Probate, must now be brought in the Probate Division of the High Court.

(A) ADMINISTRATION.

RULE 62.¹ — The Court has jurisdiction to make a grant² in respect of the personal property³ of a deceased person, if any personal property of the deceased either

(1) is locally⁴ situate in England at the time of his death, or

(2) has become locally situate in England at any time since his death,

and not otherwise.

The locality of the deceased's personal property under this Rule is not affected by his domicile at the time of his death.⁵

¹ *Tristram & Coote, Prob. Prac.*, 11th ed., pp. 355–357; *Preston v. Melville*, 1840, 8 Cl. & F. 1; *Enohin v. Wylie*, 1862, 10 H. L. C. 1; *Attorney-General v. Bouwens*, 1838, 4 M. & W. 171; *In Goods of Tucker*, 1864, 3 Sw. & Tr. 535; 34 L. J. P. & M. 29; *In Goods of Coode*, 1867, L. R. 1 P. & D. 449; *Attorney-General v. Hope*, 1834, 1 C. M. & R. 530; 2 Cl. & F. 84. Compare *In Goods of Fittock*, 1863, 32 L. J. P. & M. 157; *In Goods of Lord Howden*, 1874, 43 L. J. P. & M. 26; *In Goods of De la Saussaye*, 1873, L. R. 3 P. & D. 42; *In Goods of Harris*, 1870, L. R. 2 P. & D. 83.

² The grants made by the Court, whether grants of letters of administration or grants of probate, are of different kinds. Thus the Court may make a general grant of administration where the deceased dies without having made any will at all, or a grant of administration *cum testamento annexo*, as where a person dies having made a will and has not appointed an executor. So, again, the Court may admit the whole of a will to probate, or may admit part only of a testamentary document to probate and refuse it as to the rest, or may grant limited probate where the testator has limited the executor. See *Walker & Elgood*, 2nd ed., chaps. v. to xi. These and other distinctions should be borne in mind. They do not, however, unless specially referred to, concern the Rules in this Digest. When a grant is mentioned therein, what is meant is, unless the contrary be stated, a general grant applying, as far as the English courts can make it apply, to all the personal property of the deceased. As to the property which passes under an English grant, see chap. x., Rule 72, *post*.

³ As to meaning of "personal property," see Rule 61, p. 311, *ante*.

⁴ As contrasted with its being "constructively" or "fictitiously" situate in the country where the deceased dies domiciled, in accordance with the principle, *mobilia sequuntur personam*.

⁵ *Attorney-General v. Hope*, 1834, 1 C. M. & R. 530; 2 Cl. & F. 84; *Fernandes' Executors Case*, 1870, L. R. 5 Ch. 314; *In Goods of Ewing*, 1881, 6 P. D. 19; *Laidlay v. Lord Advocate*, 1890, 15 App. Cas. 468, 483.

Comment.

The Court has jurisdiction to make a grant whenever the deceased dies leaving any personal property whatever situate in England, even if it be no more than his clothes. Hence, whenever a person dies in England, the Court has almost of necessity jurisdiction; the Court, again, has jurisdiction when personal property of the deceased comes into England after the date of his death; the foundation, in short, of the jurisdiction of the Court is that there is personal property of any kind of the deceased to be distributed within its jurisdiction,¹ *i. e.*, in England. Nor, as regards the Court's jurisdiction, does it appear to make any difference that goods of the deceased which, at the time of his death or after his death, have been in England, have been subsequently removed; in such a case there would be a right of action against any person who wrongfully removed them. The exercise, however, of the Court's jurisdiction, is to a certain extent a matter of discretion.²

Where, on the other hand, there is not or has not been in England any personal property (using that term in its very widest sense) of the deceased's, the Court has no jurisdiction³ to make a grant.

"The foundation of the Court's jurisdiction being personal property of a deceased to be distributed in this country, administration will not be granted in respect merely of property abroad. It is a condition precedent to a grant that it should appear that the deceased left personal property in this country."⁴

"It is not," it has been laid down with reference to a particular case, "one of the functions of this Court to determine, as an abstract question, who is the proper representative of a deceased person, and if the Courts of France insist upon such a declaration they are very unreasonable. The foundation of the jurisdiction of this Court is, that there is personal property of the deceased to be distributed within its jurisdiction. In this case the deceased had no property within this country, and the Court has therefore no jurisdiction."⁵

¹ *In Goods of Tucker*, 1864, 3 Sw. & Tr. 585, 586.

² *In Goods of Ewing*, 1881, 6 P. D. 19.

³ See, for what may possibly be considered an exception to the rule that the Court has no jurisdiction where there is no personal property in England, p. 319, note 4, *post*, and compare *Tristram & Coote*, pp. 37-40. Notice generally the statements as to the local situation of personal property, pp. 318-322, *post*.

⁴ *Walker & Elgood*, 2nd ed., p. 32.

⁵ *In Goods of Tucker*, 1864, 3 Sw. & Tr. 585, 586, judgment of Sir J. P. Wilde.

Two points deserve special attention : —

(1) *As to "personal property" of the deceased.* — The property, the situation of which in England gives the Court jurisdiction, must be personal property as defined in Rule 61.¹

The personal property, further, must be situate in England, in the character of personal property of the deceased, or at any rate of property to which the administrator under an English grant has a claim. The Court will not derive jurisdiction from the mere fact that property in a foreign country, which did belong to the deceased at the time of his death, but has there since his death become lawfully the property of another, comes into England.²

(2) *As to the "situation" of personal property.* — In most instances the situation of property, i. e., whether it is or is not situate in England, does not admit of doubt; but it sometimes happens that there is a real difficulty in affixing to property, especially where it consists of debts or other choses in action,³ its due local position. In the determination of the locality properly assignable to the different kinds of personalty which have been owned by a testator or intestate, the High Court is in the main guided by maxims (modified in some instances by statute) derived from the practice of those ecclesiastical tribunals whose jurisdiction in "matters and causes testamentary," to use a convenient expression taken from the Probate Act, 1857, has ultimately passed to the High Court.⁴ These maxims, as modified by statutory enactments, are based on two considerations: the first is, that property, so far as it consists of tangible things, must in general be held situate at the place where at a given moment it actually lies; the second is, that property may in some instances, and especially where it consists of debts or choses in action, be held to be situate at the place where it can be effectively dealt with. From these two considerations flows the following general maxim, viz., *that whilst lands, and generally, though not invariably, goods, must be held situate at the place where they at a given moment actually lie, debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the*

¹ See p. 311, *ante*.

² See chap. x., Rule 72, *post*; chap. xvii., Rule 117, *post*; and chap. xxiii., Rule 140, *post*.

³ See pp. 71, 72, *ante*.

⁴ Under the Probate Act, 1857 (20 & 21 Vict. cap. 77), ss. 1, 3, 4, 23, taken together with the Judicature Act, 1873 (36 & 37 Vict. cap. 66), s. 16.

country where they are properly recoverable or can be enforced. Thus English leaseholds are situate in England; and so goods, lying in a warehouse in England, are to be held situate in England, and debts due from debtors resident in England are also to be held there situate; French lands, on the other hand, — goods in French warehouses, and, in general, debts due from debtors resident in France, — are to be held situate in France.¹

But the considerations on which our general maxim is grounded introduce some real or apparent exceptions to its operation.

Any British ship, for example, belonging to a deceased person, which is registered at any port of the United Kingdom, is to be held, for some purposes at any rate, to be situate at that port:² so goods on the high seas which are capable of being dealt with in England by means of bills of lading in this country are, wherever actually situate, to be held situate in England;³ and goods which at the death of the deceased owner are *in transitu* to this country, and arrive here after his death, are apparently to be held situate in England at his death.⁴

When bonds, again, or other securities, *e. g.*, bills of exchange, forming part of the property of a deceased person, are in fact in England and are marketable securities in England, salable and transferable there by delivery only, without its being necessary to do any act out of England in order to render the transfer valid,

¹ As to the locality of a simple contract debt, compare *Hanson*, 3rd ed., p. 159; *Attorney-General v. Higgins*, 1857, 2 H. & N. 339, 348; and *Attorney-General v. Bouwens*, 1838, 4 M. & W. 171, 192, judgment of Abinger, C. B. "The locality of a mortgage debt is regulated by the same rules as apply to other debts, and does not in any way depend upon the situation of the property comprised in the mortgage." *Hanson*, 3rd ed., p. 160. See, however, *Walsh v. Reg.* [1894] A. C. 144; *Reg. v. Balby Road*, 1853, 22 L. J. Q. B. 164; *Attorney-General v. Sudeley*, [1895] 2 Q. B. 526.

² See 27 & 28 Vict. cap. 56, ss. 4, 5.

³ *Hanson*, 3rd ed., 160; *Attorney-General v. Hope*, 1834, 1 C. M. & R. 530.

⁴ *Hanson*, 3rd ed., p. 162; *Attorney-General v. Pratt*, 1874, L. R. 9 Ex. 140; *Wyckoff's Case*, 1862, 3 Sw. & Tr. 20; 32 L. J. P. & M. 214.

Under this head may be brought the exceptional cases in which the Court, though there is no property of the deceased strictly situate in England, will make a grant on the ground that he has left personal property in a foreign country, *e. g.*, money at a bank in Canada, which would be remitted to England by the banker, on a personal representative being constituted in England. The money is in this case virtually *in transitu*.

For a probable application of a similar principle to ships and cargoes which, though in fact in England, are destined to return to the country, *e. g.*, New York, where their owner dies domiciled, see *Story*, ss. 519, 520, from which it would seem that such ships and cargoes should be treated as situate in New York at the time of the owner's death.

not only the bonds or bills themselves, but also, what is a different matter, the debts or money due upon such bonds or bills, are to be held situate in England, and this though the debts or money are owing from foreigners out of England.¹ The reason manifestly is that the bonds or bills, though they may from one point of view be looked upon as mere evidence of debts which, being due from persons resident abroad, should be considered situate in a foreign country, are in reality chattels of which the representative of the deceased owner can obtain the full value in England, and this without doing any act in a foreign country. Such bonds differ essentially from any foreign stock which cannot be fully transferred by the representative of the deceased without doing some act in a foreign country. The certificates or other documents, if any, held by the owner of such stock, may be in England, but they are mere evidence of a debt due from a foreign government, or, in other words, from a debtor not resident in England, and this debt, *i. e.*, the stock, must apparently be held situate out of England.²

Owing to the view held by the ecclesiastical tribunals that a debt due on a deed or other specialty was to be considered as situate, not where the debtor resided, but at the place where the deed itself was situate,³ and the modification of this doctrine by a statutory enactment,⁴ the rules as to the situation of such a debt are anomalous. A debt due on a deed situate in England from a debtor resident abroad,⁵ and also a debt due on a deed situate abroad from a debtor resident in England,⁶ must each be held situate in England. A debt due on a deed situate abroad from a debtor resident abroad is, like any other debt due from such debtor, to be held situate out of England.⁷

It was, further, long ago "established by law that judgment "debts were assets, for the purposes of jurisdiction, where the judgment is recorded;"⁸ and this rule, though it sounds technical, is in substantial conformity with the principle regulating the locality

¹ *Attorney-General v. Bouwens*, 1838, 4 M. & W. 171.

² Compare *Attorney-General v. Bouwens*, 1838, 4 M. & W. 171, 192, 193, with *Attorney-General v. Dimond*, 1831, 1 C. & J. 356; *Attorney-General v. Hope*, 1834, 1 C. M. & R. 530. But see *Stern v. Reg.* 1896, 12 Times L. R. 134.

³ See *Commissioner of Stamps v. Hope*, [1891] A. C. 476; *Gurney v. Rawlins*, 1836, 2 M. & W. 87.

⁴ See Revenue Act, 1862 (25 & 26 Vict. cap. 22), s. 39.

⁵ *Commissioner of Stamps v. Hope*, [1891] A. C. 476.

⁶ Revenue Act, 1862 (25 & 26 Vict. cap. 22), s. 39.

⁷ See pp. 318, 319, *ante*.

⁸ *Attorney-General v. Bouwens*, 1838, 4 M. & W. 171, 191, judgment of Abinger, C. B.

of debts, for a judgment debt is enforceable by execution, or some similar process, in the country where the judgment is recorded.¹

A share, lastly, in a partnership business is to be held situate, not where the surviving partners reside, but where the business is carried on. "The share of a deceased partner in a partnership 'asset,' it has been laid down by Sir James Hannen, 'is situate 'where the business is carried on,'"² and this view has been followed by the House of Lords.³

Most of the reported decisions and of the enactments with regard to the local situation of a deceased person's personalty have immediate reference, not to jurisdiction, but to the liability of the deceased's property to the payment of probate duty.⁴ The two matters, however, are closely connected. The jurisdiction of the High Court in matters testamentary depends on there being property of the deceased situate within the limits of a district in England over which an ecclesiastical Court used to exercise jurisdiction, but probate duty, whilst it existed,⁵ was imposed only on such personal property of the deceased as at the time of his death was situate within such limits.⁶ Hence where, under any decision or

¹ A debt due on a foreign, *e. g.*, a French, judgment, is not indeed in strictness a judgment debt (*Duplein v. De Roven*, 1705, 2 Vern. 540), but it is nevertheless recoverable in the country where the judgment is obtained.

² *In Goods of Ewing*, 1881, 6 P. D. 19, 23. Compare, however, *Attorney-General v. Sudeley*, [1895] 2 Q. B. 526, 530, judgment of Russell, L. C. J.

³ *Laidlay v. Lord Advocate*, 1890, 15 App. Cas. 468. Compare p. 482, for the argument in support of the other possible view that the share of a partner in a partnership business is simply a claim, and ought therefore to be held situate wherever it can be enforced against the surviving partners.

⁴ See *Attorney-General v. Bouwens*, 1838, 4 M. & W. 171, 191, 192, judgment of Abinger, C. B.; *Attorney-General v. Hope*, 1834, 1 C. M. & R. 530, especially pp. 560, 561, language of Lord Brougham, and compare 22 & 23 Vict. cap. 36; 25 & 26 Vict. cap. 22; 27 & 28 Vict. cap. 56. See, as to relation between liability to probate duty and liability to estate duty, App., Note 17, *Limits of Taxation*. The technical and somewhat artificial distinctions as to the situation of personal property in reference to the incidence of probate duty may still occasionally be of importance in reference to the incidence of estate duty. See Finance Act, 1894 (57 & 58 Vict. cap. 30), s. 2, sub-s. 2, and s. 8, sub-s. 1.

⁵ It is for all practical purposes abolished as regards property passing on the death of a person dying after 1st August, 1894. See the Finance Act, 1894, s. 1, and First Schedule.

⁶ *I. e.*, in so far as the duty fell on *English* property. Probate duty fell on property situate in other parts of the United Kingdom (see *Hanson*, 3rd ed., Intro., pp. 1-3), but all reference to it as a tax on movable or personal property in Scotland or Ireland is here purposely omitted. The English cases refer to duty payable in respect of property alleged to be situate in England, and therefore in these cases the decision that property is or is not liable to probate

statute, it can be shown that any property of a deceased person would, if probate duty now existed, be liable to such duty, it follows that such property is so situate in England as to give the Court jurisdiction to make a grant. The inference, however, must not be drawn that, because no personal property of the deceased would be liable to the payment of probate duty if such duty still existed, therefore there is nothing belonging to the deceased so situate in England as to give the Court jurisdiction to make a grant; and this for two reasons. The first is, that probate duty was chargeable only on property situate in England at the time of the deceased's death.¹ The second is, that the character of the thing or the property, on the situation whereof liability to probate duty depended, is not always exactly the same as the character of the thing or property on the situation whereof the jurisdiction of the ecclesiastical Courts depended, and the jurisdiction of the High Court still depends. The liability to duty used to depend on the situation in England of a thing of some pecuniary value on which the tax could operate, *e. g.*, a debt owing to the deceased. The jurisdiction of the Court depends on there being in England some thing — if the word “thing” be used in a very wide sense — for the dealing with which the representative of the deceased requires a grant. These two things may, but they may not, coincide. Thus the deceased dies in France and leaves debts due to him from Frenchmen living in France. The only things he has left in England are letters, of a merely nominal value in themselves, but needed by his representatives as evidence of the French debts; the holder of the letters will not give them up to any one who has not constituted himself in England the representative of the deceased. Under these circumstances there is no property of the deceased in England which would have been liable to probate duty, but there is property of the deceased, *viz.*, the letters, to which the representative of the deceased has a right, and the presence of which in England gives the Court jurisdiction to make a grant.

Domicil. — The fiction embodied in the often misleading maxim, *mobilia sequuntur personam*, under which the movables of a deceased person are for some purposes² regarded as situate in the

duty is a decision that it is or is not situate in England. “The principles, however, for determining its locality were the same whatever was the part of the United Kingdom in which it was alleged to be situate. Hence a Scotch decision, such as *Laidlay v. Lord Advocate*, 1890, 15 App. Cas. 468, gives us guidance in deciding whether given property is or is not situate in England.

¹ See 1 *Williams, Executors*, 9th ed., 542, 544.

² *E. g.*, the distribution of, and the beneficial succession to, an intestate's

country where he has his domicile at the time of his death, has no application to the local situation of personal property as regards the jurisdiction of the Court to make a grant.¹

Illustrations.

1. *T*,² a Frenchman domiciled in France, dies in France leaving goods in England and book debts due to him from *X*, a Frenchman residing in England.³ The Court has jurisdiction.

2. *T* dies in Australia leaving money due to him from an incorporated banking company having its head office in London.⁴ The Court has jurisdiction.

3. *T* dies in France. *X*, who resides in England, owes *T* £100 on a bond which is in France. The Court has jurisdiction.⁵

4. *T* dies in France. *X*, who resides in France, owes *T* a movables (see chap. xxx., Rule 180, *post*), or the determination of the liability of a deceased person's movables to legacy duty. (See App., Note 17, *Limits of Taxation*.)

¹ See p. 316, *ante*. For a contrary view see *Broune, Prob. Prac.*, 2nd ed., p. 143, where it appears to be stated that the Court has jurisdiction to grant probate whenever a person dies domiciled in England. This opinion derives some apparent countenance from *Spratt v. Harris*, 1833, 4 Hagg. Ecc. 405; *In re Winter*, 1861, 30 L. J. P. & M. 56, but is inconsistent with *Attorney-General v. Hope*, 1834, 1 C. M. & R. 530; 2 Cl. & F. 84; *In Goods of Fittock*, 1863, 32 L. J. P. & M. 157; *In Goods of Coode*, 1867, L. R. 1 P. & D. 449, and generally with the well-established principle that "probate duty attaches to bona notabilia in the place where the goods are situate, wholly irrespective of the question of the domicile of the testator." *Laidlay v. Lord Advocate*, 1890, 15 App. Cas. 468, 483, language of *Herschell*, Ch. See *In Goods of Ewing*, 1881, 6 P. D. 19, 23, judgment of Sir J. Hannen; *Fernandes' Exors. Case*, 1870, L. R. 5 Ch. 314, 317, judgment of *Giffard*, L. J.

² "*T*" in the illustrations to this Rule stands for testator, but for the purpose of the Rule it makes no difference whether the deceased died testate or intestate. In each of these illustrations it is to be assumed that there was no other property of the deceased in England than that mentioned in the illustration.

³ *Preston v. Lord Melville*, 1840, 8 Cl. & F. 1; *Enohin v. Wylie*, 1862, 10 H. L. C. 1; *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34.

⁴ The company resides legally where it has its head office. (See Rule 19, p. 154, *ante*.) Hence there is a debt due to the deceased from a debtor resident in England. "Property which consists of shares in or claims upon any company or society must be taken to be locally situate where the company has its head office." *Hanson*, p. 160. Compare *Attorney-General v. Higgins*, 1857, 2 H. & N. 339; and *Fernandes' Exors. Case*, 1870, L. R. 5 Ch. 314.

⁵ This is the apparent result of the Revenue Act, 1862 (25 & 26 Vict. cap. 22), s. 39. This enactment (semble) takes specialty debts due from persons in the United Kingdom out of the operation of the exceptional rule that a specialty debt is situate where the deed is situate.

debt under a deed which is situate in England. The Court (semble) has jurisdiction.¹

5. *T* dies at Paris. Before his death he has purchased at New Orleans a cargo of cotton. At the time of his death it is on the high seas on board an American ship, and bills of lading under which the cotton can be disposed of are in London in the hands of *T*'s broker. The Court has jurisdiction.²

6. *T*, a British subject, dies in France. He is owner of a British ship registered at the port of Liverpool. She is, at the time of *T*'s death, at New York. The Court (semble) has jurisdiction.³

7. *T* dies domiciled in France. Two months after his death, goods purchased by him in the United States, and ordered by him to be sent to London, arrive at the house in London where he had ordered them to be sent. His personal representative, under French law, applies for a grant. The Court has jurisdiction.⁴

8. *T* is a member of a partnership carrying on business in England, and is entitled to a share in the partnership assets; he dies abroad domiciled in France. The Court has jurisdiction.⁵

9. *T*, an Englishman resident in France, dies there, having by his will appointed *A* his executor. *T* leaves at the moment of his death jewels worth £1,000 in England. *T*'s son, an Englishman, who also resides in France, is at the moment of *T*'s death in England. He takes possession of the jewels and returns with them to his home in France. After the removal of the jewels *A* applies for a grant of probate. The Court has jurisdiction.⁶

10. The wife of an Englishman residing and domiciled in England is separated from him and living in France. She dies there intestate, leaving personal property in France, but leaving none in England. The husband cannot establish his claim in France

¹ *Commissioner of Stamps v. Hope*, [1891] A. C. 476, 481, judgment of P. C., delivered by Lord Field, where the rule as to the situation of specialty debts is explained.

² And this for two reasons. The cotton itself is to be considered as situate in England because it can be dealt with there. (See *Hanson*, 3rd ed., p. 160, and compare *Attorney-General v. Hope*, 1834, 1 C. M. & R. 530; *Attorney-General v. Pratt*, 1874, L. R. 9 Ex. 140; *Wyckoff's Case*, 1862, 3 Sw. & Tr. 20.) The bills of lading are actually in England, and this would give the Court jurisdiction. Compare as to bills of exchange, etc., *Attorney-General v. Bouvens*, 1838, 4 M. & W. 171.

³ See Revenue Act No. 2, 1864 (27 & 28 Vict. cap. 56), s. 4.

⁴ See pp. 316, 317, *ante*.

⁵ Compare *In Goods of Ewing*, 1881, 6 P. D. 19, 23, judgment of Sir Jas. Hannen; and *Laidlay v. Lord Advocate*, 1890, 15 App. Cas. 468.

⁶ See pp. 316, 317, *ante*.

to her property without an English grant. The Court has (semble) no jurisdiction to make a grant.¹

11. *T* dies abroad domiciled in England. By his will he has appointed *A* his executor. He leaves money in a bank at Chili and goods in warehouses in France. *A* applies for a grant of probate. The Court has no jurisdiction.²

(B) SUCCESSION.

RULE 63.³ — Where the Court has no jurisdiction to make a grant,⁴ the Court has no jurisdiction with regard to the succession to the personal property of a deceased person.

Comment.

English Courts will not discuss, and have no jurisdiction to adjudicate upon, the claim of any man to succeed beneficially to, or indeed to derive any benefit from, the personal property of a deceased person, unless there is before the Court some person authorised under an English grant⁵ to deal with such property, and in respect thereof to represent the deceased. Even the representative under the law of a foreign country of a foreigner who dies domiciled abroad has no *locus standi*⁶ before an English Court until he has obtained an English grant.⁷

The validity, indeed, of a will of personalty — a matter which affects succession⁸ — can be decided, and indeed can be decided only, in an action of which the object is to determine a person's claim to an English grant, *i. e.*, in a probate action. But this

¹ See *In Goods of Tucker*, 1864, 3 Sw. & Tr. 585, and compare passage from judgment of Sir *J. P. Wilde*, cited p. 317, *ante*. Note that the wife is at the time of her death domiciled in England. See p. 127, *ante*, and conf. *Dolphin v. Robins*, 1859, 7 H. L. C. 390.

² See *In Goods of Coode*, 1867, L. R. 1 P. & D. 449.

³ See *Attorney-General v. Hope*, 1834, 1 C. M. & R. 530, and especially p. 540, language of *Brougham*, Ch., and pp. 562–564 (note).

⁴ See for meaning of “grant,” p. 312, *ante*; and see also, as to where Court has no jurisdiction to make a grant, Rule 62, p. 316, *ante*.

⁵ See p. 312, *ante*.

⁶ Compare 2 *Williams*, 9th ed., 1915; *Attorney-General v. Hope*, 1834, 1 C. M. & R. 530, 540, 562–564.

⁷ As to extension of a Scotch grant, of an Irish grant, or of a Colonial grant to England, see chap. xvii., Rules 119–121, *post*.

⁸ “Succession” of course means, as generally in this chapter, succession to personal property.

fact in no way invalidates Rule 63. A probate action involves or implies the authority of the Court to make a grant.

Illustrations.

1. *N*, domiciled in England, dies in France intestate, leaving goods and money in France, but leaving no personal property of any kind in England. *A* claims *N*'s property as his next of kin. The Court has no jurisdiction to determine whether *A* is entitled to succeed to *N*'s property.¹

2. *T* dies domiciled in England. By his will, made in accordance with the English Wills Act, he appoints *X* his executor. *T* leaves no property whatever in England. He leaves goods and money in France and in Germany. *A* claims a legacy of £10,000 under *T*'s will. The Court has no jurisdiction to determine whether *A* is entitled to the legacy.²

RULE 64. — Where the Court has jurisdiction³ to make a grant, the Court has, in general, jurisdiction to determine any question with regard to the succession to the assets of a deceased person.

Comment.

The jurisdiction of the Court is in no way restricted to dealing with the property the presence of which in England gives it authority to make a grant. Where jurisdiction to make a grant exists, the Court has (in general) jurisdiction⁴ to determine every question whatever connected with succession to movables, and to provide for the succession to the assets of the deceased, or rather to the distributable residue thereof. With regard to such distributable residue the Court, for example, has authority to decide

¹ Compare *Re Tucker*, 1864, 34 L. J. P. & M. 29; 3 Sw. & Tr. 585.

² Compare *In Goods of Coode*, 1867, L. R. 1 P. & D. 449.

³ As to where the Court has jurisdiction to make a grant, see Rule 62, p. 316, *ante*.

⁴ Whether the jurisdiction is exercised in a probate action brought in the Probate Division of the High Court, or in an administration action brought in the Chancery Division of the High Court, is for the purpose of these Rules immaterial. It is in either case equally the jurisdiction of the High Court. Note further the extremely wide jurisdiction of the Court, when it has before it representatives of the deceased, to administer in an administration action the whole personal property of the deceased as far as lies within the power of the Court. See *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34; 1885, 10 App. Cas. 453.

whether the will or alleged will of the deceased is a valid testamentary disposition,¹ what is the construction or effect of the will,² who are the persons entitled to succeed to the movable property of an intestate,³ and the like, and generally to provide for the due succession to the assets of the deceased.

The words "in general" in our Rule point out that the jurisdiction of the Court under that Rule is not absolutely unrestricted. The Court's jurisdiction is exercised, generally speaking, on an administration action⁴ being brought by some one, *e. g.*, a legatee, or next of kin, interested in the distribution of a deceased testator or intestate's estate, for the purpose of having the estate administered by the Court. For the maintenance of such an action, it is necessary that the personal representative, who has obtained an English grant, should be made a party to it, for "an estate cannot be administered . . . in the absence of a personal representative, and consequently, if it appear that the Court cannot give the plaintiff the relief which he asks without an administration of the estate, there must be a personal representative of it before the Court;"⁵ and "in cases where the executor or administrator is required to be made a party, it is not sufficient that he is such by the appointment and authority of a foreign government; but he must obtain his right to represent the estate from the Probate Court of this country."⁶

But this action, like every other, commences with the issue of a writ, which must be served upon the personal representative, or, using the word "administrator" in a wide sense, upon the administrator. And any restriction on the service of the writ is, as we have already pointed out,⁷ a restriction on the exercise of the Court's jurisdiction. When the administrator is in England, the Court has jurisdiction to entertain the action, for it is always possible for the administrator to be served with the writ. When the administrator is not in England, the rule still is that he cannot be served with the writ, and therefore that the Court has no jurisdic-

¹ *Bremer v. Freeman*, 1857, 10 Moore P. C. 306.

² *Enokin v. Wylie*, 1862, 10 H. L. C. 1; 31 L. J. Ch. 402.

³ *Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301.

⁴ See as to an administration action, *Williams, Executors*, 9th ed., 1903, and following; and see as to proceedings on an originating summons, R. S. C. Ord. LV. rr. 3-14, and note that originating summons cannot be served out of England. 2 *Williams, Executors*, 9th ed., p. 1806, note (z); *In re Busfield*, 1886, 32 Ch. D. (C. A.) 123.

⁵ 2 *Williams, Executors*, 9th ed., p. 1912.

⁶ 2 *Williams, Executors*, 9th ed., p. 1915.

⁷ See pp. 237, 238, *ante*.

tion to entertain an action against him.¹ To this rule the exceptions are, it is true, extremely wide. Whenever an "action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled" in England,² the Court has jurisdiction to allow service of a writ, and therefore to entertain an action against the administrator though he is out of England; so, again, the Court has jurisdiction to entertain an administration action against an administrator who is out of England in any of the exceptional cases, in so far as they can possibly be applicable to such an action, in which the Court has jurisdiction to entertain an action *in personam* against a defendant who is out of England.³ But, wide as are the exceptions to the principle that the Court has no jurisdiction to entertain an administration action against an administrator who is not in England, they do not apparently cover every case which can arise.

Illustrations.

1. *T*, a Frenchman, dies domiciled in England, leaving a house, of which he is tenant for years, household furniture, and other goods in England. *T* leaves a will, the construction of which is doubtful. The Court has jurisdiction to determine whether the will is valid, and who are the persons entitled beneficially to *T*'s property under the will.⁴

2. *N*, a Frenchman domiciled in England, dies in France intestate, leaving in England leasehold property, household furniture, and stock in trade. The Court has jurisdiction to determine who are the persons beneficially entitled to *N*'s property.⁵

3. *T* dies domiciled in Russia, leaving money in the English funds. Under a will made in the form required by Russian law, *T* appoints *X* his executor. *X* is recognised as *T*'s executor by the Russian Courts. A question arises under *T*'s will whether *T* did or did not die intestate as to his English property. The Court has jurisdiction to determine the construction of *T*'s will, and to

¹ See *In re Eager*, 1882, 22 Ch. D. (C. A.) 86, which is not inconsistent with *In re Lane*, 1886, 55 L. T. 149, where (semble) service was allowed under R. S. C. Ord. XI. r. 1 (g).

² R. S. C. Ord. XI. r. 1 (d). The words in the rule of Court are not "in England," but "within the jurisdiction." Compare p. 207 and p. 240, note 4, *ante*.

³ See Exceptions 1 to 7, pp. 240-254, *ante*, to Rule 46, p. 237, *ante*.

⁴ Compare *Enohin v. Wylie*, 1862, 10 H. L. C. 1.

⁵ *Re Goodman's Trusts*, 1881, 17 Ch. D. (C. A.) 266; *Doucet v. Geoghegan*, 1878, 9 Ch. D. (C. A.) 441.

divide *T*'s property in England among the persons who, on a right construction of the will, are beneficially entitled to it; but as a general rule the Court, having granted administration to *X*, will leave the persons claiming succession to *T*'s personal property to enforce their rights before the Russian tribunals.¹

4. *N*, domiciled in New York, dies there intestate, leaving goods and lands in New York, and money and stock in trade in England. *A* obtains letters of administration in New York. *B*, in England, claims to be entitled to the whole of *N*'s personal property as next of kin. *A*, as the representative of *N* under the law of *N*'s domicil, claims to have *N*'s personal estate in England handed over to him. The Court has jurisdiction to determine what are the rights of *B*, but will, in general, grant administration to *A*, and leave *B* to enforce his rights (if any) before the Courts of New York.²

¹ Compare *Enohin v. Wylie*, 1862, 10 H. L. C. 1; 31 L. J. (Ch.) 402, 409. Compare, however, *Eames v. Hacon*, 1880, 16 Ch. D. 407, 409; 1881, 18 Ch. D. (C. A.) 347.

² See *Enohin v. Wylie*, 1862, 10 H. L. C. 1. That case refers to the construction of a will; but there is, it is submitted, in principle, no distinction as regards the jurisdiction of the Court between the rules applicable to testamentary and those applicable to intestate succession.

AMERICAN NOTES.

CHAPTER IX.

JURISDICTION IN MATTERS OF ADMINISTRATION AND SUCCESSION.

1. JURISDICTION TO GRANT ADMINISTRATION.—As the grant of administration generally is regulated in the United States by local statutes, the jurisdictional grounds on which such a grant depends vary in the different States and Territories. As to the courts that have jurisdiction to make such a grant, see 1 *Williams on Executors*, 7th Am. ed., Randolph & Talcott's notes, pp. 341-344. The Circuit Courts of the United States have jurisdiction in equity, independently of statutes or practice in any State, to administer, as between citizens of different States, any deceased person's assets within the district. *Payne v. Hook*, 7 Wall. 425; *Kennedy v. Creswell*, 101 U. S. 641; *Johnson v. Powers*, 139 U. S. 156.

The proper place for the principal administration of a deceased person's estate is that of his domicil, *Wilkins v. Ellet*, 108 U. S. 256, 258; and the court of the domicil is the forum to which the legatees under a will, or the parties entitled to the distribution of the estate of an intestate, are required to resort. *Hutton's Exrs. v. Hutton*, 40 N. J. Eq. 461, 466. See *Graveley v. Graveley*, 25 S. C. 1; *Mahnkin's Case*, 36 N. J. Eq. 518. But, under the statutes, some or all of the following facts may afford ground for a grant of administration: (1) The death of a resident of the State; (2) the death therein of a non-resident; (3) the death therein of a non-resident leaving estate therein; (4) the existence therein of estate of a deceased non-resident; (5) the existence therein of lands of a deceased non-resident. See 1 *Williams on Executors*, 7th Am. ed., Randolph & Talcott's notes, pp. 345-354, 482, 483. See also, *Moise v. Life Association*, 45 La. An. 736; 13 So. 170; *Putnam v. Pitney*, 45 Minn. 242; 47 N. W. 790; *Jones v. Warren*, 70 Miss. 227; 14 So. 25; *Graveley v. Graveley*, 25 S. C. 1; *Petersen v. Chemical Bank*, 32 N. Y. 21; *Toledo &c. R. R. Co. v. Reeves* (Ind. App.), 35 N. E. 199; *Mallory v. Burlington &c. R. R. Co.* (Kans.) 36 Pac. 1059; *King v. United States*, 27 Ct. of Cl. 529; *In re Lewis' Estate*, 10 Pa. Co. Ct. 331.

Where a will has been probated in a foreign Court, a copy may be admitted to probate in the Courts of decedent's last domicil. *McDonald's Estate*, 130 Pa. St. 480; 18 Atl. 617.

2. SITUS OF ASSETS.—The jurisdiction to grant administration, on the ground of the presence of personal property of a deceased person, is based upon the general principle that tangible things are held to be situate at the place where for the time they actually are. Administration may extend to property brought into the State after the death of the owner as well as before. *Saunders v. Weston*, 74 Me. 85; *Smith v. New York Life Ins. Co.* 57 Fed Rep. 133.

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As between the States of the United States, a ship at sea is presumed to be situate in the State in which it is registered. *Crapo v. Kelly*, 16 Wall. 610; *Wharton, Conf. of L.* s. 357.

"The general rule of law is well settled that, for the purpose of founding administration, all simple contract debts are assets at the domicile of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable." *Wyman v. Halstead*, 109 U. S. 654. See also, *Cooper v. Beers*, 143 Ill. 25; *Moore v. Jordan*, 36 Kan. 271; *Eells v. Holder*, 2 McCrary, 622; *Saunders v. Weston*, 74 Me. 85; *Speed v. Kelly*, 59 Miss. 47, 52; *Weaver v. Norwood*, 59 Miss. 665; *Willard v. Wood*, 1 App. D. C. 44 (as to mortgage debt); *Becroft v. Lewis*, 41 Mo. App. 546; *Connor v. Hanover Ins. Co.* 28 Fed. Rep. 549. A claim against the United States is not a local asset in the District of Columbia. *King v. U. S.* 27 Ct. of Cl. 529. A bond, being a specialty, does not come within the rule as to simple contract debts, but is assets for the purposes of administration in the place in which it is found. *Beers v. Shannon*, 73 N. Y. 292. By the Code of Civil Procedure of New York, a debt represented by a promissory note is treated for the same purpose as assets where the note is. *Matter of Hopper*, 5 Demarest, 242. See *Speed v. Kelly*, 59 Miss. 47; *Jahier v. Rascoe*, 62 Miss. 699; *Mayo v. Assurance Society*, 71 Miss. 590.

A policy of insurance on the life of a person may be treated as assets for the purpose of founding an administration in a State into which it is brought after his death; and a suit on the policy may be maintained in such State against a debtor company which does business there, and has an agent on whom process may be served. *New England Life Ins. Co. v. Woodworth*, 111 U. S. 138. See *Equitable Life Assurance Society v. Vogel*, 76 Ala. 441, 52 Am. Rep. 344; *Smith v. New York Life Ins. Co.* 57 Fed. Rep. 133. In *Mayo v. Assurance Society*, 71 Miss. 590, it was held that an insurance policy, issued and payable in New York, on the life of a person domiciled in Virginia, passed to his administrator in Virginia, though it was deposited with a person in Mississippi, who, as administrator there, sought to collect it.

3. SUCCESSION TAXES.—See *Dos Passos, The Law of Collateral Inheritance, Legacy and Succession Taxes*; 3 *Williams on Executors*, 7th Am. ed., Randolph & Talcott's notes, pp. 1-7.

CHAPTER X.
EXTRA-TERRITORIAL EFFECT OF
ENGLISH JUDGMENT;
ENGLISH BANKRUPTCY;
ENGLISH GRANT OF ADMINISTRATION.

(A) ENGLISH JUDGMENT.

RULE 65.—A judgment of the Court (called in this Digest an English judgment) has, subject to the exception hereinafter mentioned, no direct operation out of England.

The extra-territorial effect (if any) of an English judgment is a question of foreign law.

Comment.

The judgment, or in other words the command of a Court, cannot of itself operate beyond the limits of the territory over which the Court has jurisdiction. An English judgment, therefore, has, *proprio vigore*, no operation in any country but England. The Courts of a foreign country may, and no doubt in many cases will, give effect to an English judgment, or, more strictly, to the right acquired under it.¹ But whether, to what extent, and by what means, a foreign, *e. g.*, a French or Victorian Court, will enforce a right acquired under an English judgment, is a question not of English but of foreign law.

Exception.—An English judgment for any debt, damages, or costs may be rendered operative in Ireland or Scotland by registration of a certificate thereof in accordance with the provisions of Rule 101.²

¹ See Intro., pp. 24, 25, *ante*.

² See chap. xvi., Rule 101, *post*, as to the extension of certain judgments *in personam* throughout the United Kingdom, and Judgments Extension Act, 1868, 31 & 32 Vict. cap. 54.

(B) ENGLISH BANKRUPTCY¹ AND WINDING-UP OF COMPANIES.²

I. BANKRUPTCY.

(i) *As an Assignment.*³

RULE 66.⁴—An assignment of a bankrupt's property to the trustee in bankruptcy under the Bankruptcy Act, 1883 (English bankruptcy), is, or operates as, an assignment of the bankrupt's

(1) immovables⁵ (land),

(2) movables,⁶

whether situate in England or elsewhere.

Comment.

Under the Bankruptcy Act, 1883, the bankrupt's "property"⁷ vests, on his being adjudged bankrupt, in the trustee for the benefit of his creditors; and "property," as defined by the Act, "includes money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined."⁸

¹ For the Court's jurisdiction in Bankruptcy, see chap. viii., p. 285, *ante*.

² For the Court's jurisdiction in Winding-up of Companies, see chap. viii., p. 303, *ante*.

³ See the Bankruptcy Act, 1883 (46 & 47 Vict. cap. 52), s. 20, sub-s. 1, with which read ss. 2, 43-49, 54, and 168. See generally, as to the extra-territorial effect of bankruptcy as an assignment, *Westlake*, 3rd ed., chap. vi., pp. 138-163; *Piggott*, 2nd ed., chap. x., pp. 325-340; *Nelson*, pp. 166-171; *Phillimore*, ss. 765-779; *Foote*, 2nd ed., pp. 301-313; *Goudy*, *Law of Bankruptcy in Scotland*, 2nd ed., chap. xlviii., pp. 631-638; *Story*, ss. 405-422.

Westlake's treatment of this topic is full, and deserves special attention.

⁴ See the Bankruptcy Act, 1883 (46 & 47 Vict. cap. 52), ss. 54, 44, 168; *Williams*, *Bankruptcy*, 6th ed., p. 190; *Baldwin*, 4th ed., p. 110.

⁵ For definition of "immovables," see pp. 65, 71, *ante*.

⁶ For definition of "movables," see pp. 65, 71, *ante*.

⁷ With certain limited exceptions, which have nothing to do with the rules of private international law, *e. g.*, property held by the bankrupt in trust for another person, or tools or wearing apparel of the bankrupt, his wife and children. See Bankruptcy Act, 1883, s. 44.

⁸ See Bankruptcy Act, 1883, s. 168.

Hence, speaking generally, the bankruptcy (*i. e.*, the debtor's being adjudicated a bankrupt) transfers to the trustee, as far as an Act of Parliament can accomplish this result, all the bankrupt's property, whatever its situation, and this irrespective of the bankrupt's domicile or nationality.¹ The bankruptcy, moreover (except in the case of certain *bonâ fide* transactions without notice specially protected by the bankruptcy law),² relates or dates back, as far as the title of the trustee is concerned, to the "commencement of the bankruptcy," and by this term is meant the time of the act of bankruptcy, or (if the bankrupt is proved to have committed more acts of bankruptcy than one) of the first act of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition.³ And this doctrine of relation applies to all property of the bankrupt, wherever situate, at any rate within the British dominions.⁴

The property so vested must be in strictness "property of the bankrupt;" and property which once belonged to the bankrupt, if it has before the commencement of the bankruptcy become already vested in some other person, *e. g.*, in the trustee under a Scotch bankruptcy,⁵ is not the property of the bankrupt, and does not vest in the trustee under the English bankruptcy.⁶

When, further, a bankruptcy in one country is an assignment of property situate in another, it passes the property subject, speaking generally, to any charge acquired thereon prior to the bankruptcy under the laws of the country where the property is situate,⁷ and subject also to the requirements, if any, of the local law as to the conditions necessary to effect a transfer of such property.⁸

¹ See *Foote*, pp. 302, 303. Under the Bankruptcy Act, 1883, English Courts give to an English bankruptcy a wider effect than they would independently of Acts of Parliament (see Rule 106) give to a foreign bankruptcy. (See Rules 107-109, *post.*) See *Sill v. Worswick*, 1791, 1 H. Bl. 665; *Selkraig v. Davis*, 1814, 2 Rose, 291; *Royal Bank of Scotland v. Cuthbert*, 1813, 1 Rose, 462. Compare *In re Artola Hermanos*, 1890, 24 Q. B. D. (C. A.) 640.

² Bankruptcy Act, 1883, s. 49.

³ Bankruptcy Act, 1883, s. 49.

⁴ See chap. xxviii. for the application of special rules of bankruptcy as against foreign creditors.

⁵ See Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. cap. 79), s. 102.

⁶ Compare *Nelson*, p. 169.

⁷ See *Baldwin*, 4th ed., p. 113, citing *Sill v. Worswick*, 1791, 1 H. Bl. 665; *Hunter v. Potts*, 1791, 4 T. R. 182.

⁸ *Callender v. Colonial Secretary of Lagos*, [1891] A. C. 460, 467; *Ex parte Rogers*, 1881, 16 Ch. D. (C. A.) 665, 666, dictum of *Jessell*, M. R.; *Westlake*,

Hence an English bankruptcy, though it transfers to the trustee a bankrupt's immovable and movable property situate in England or elsewhere, "only passes," it has been laid down, "immovable property in the colonies according to the law of the colonies;"¹ and this dictum, though confined to immovable property and to property in the colonies, applies apparently to movable property and to property situate in any foreign country.

(1) *As to immovables.*—In so far as the matter does not depend on any Act of Parliament, our Courts have always held that the effect of a bankruptcy is, as regards immovables, purely territorial, and that, therefore, a bankruptcy under the law of England is no more an assignment to the assignee or trustee of land, *e. g.*, in Victoria or in France,² than a bankruptcy in France is an assignment of land in England, or a bankruptcy in Victoria is an assignment of land either in England or in New Zealand.³

This principle, however, as far as an English bankruptcy is concerned, has been modified or abrogated by successive Bankruptcy Acts.

"Under the Act of 1849 [12 & 13 Vict. cap. 106], s. 142," writes Mr. Justice Williams, "it was only real property within the dominions of Her Majesty which vested in the assignees for the creditors. The Act of 1869 [32 & 33 Vict. cap. 71] contained no express provision as to the locality of real property, but did not seem to be intended to alter the law. At all events, under that Act, as under the Act of 1849, and now under the principal Act, real property in all Her Majesty's dominions vested in the trustee.⁴ The present Act . . . vests real property wherever situate; but, inasmuch as real property is governed everywhere by the *lex rei sitæ*, the alteration in the present Act will probably be of little or no practical effect, since the order of adjudication will not, it is presumed,⁵ be recognised in foreign countries as operating to transfer to the trustee real property

3rd ed., p. 153; *Jeffery v. M'Taggart*, 1817, 6 M. & S. 126; and Bankruptcy Act, 1883, s. 54, with which compare the Bankruptcy (Scotland) Act, 1856, s. 102.

¹ *Ex parte Rogers*, 1881, 16 Ch. D. (C. A.) 665, 666, per Jessell, M. R.

² See *Selkirk v. Davis*, 1814, 2 Rose, 97, 291.

³ See *Cockerell v. Dickens*, 1840, 3 Moore P. C. 98; *Ex parte Blakes*, 1787, Cox, 398; *Westlake*, 3rd ed., pp. 155, 156.

⁴ *Callender v. Colonial Secretary of Lagos*, [1891] A. C. 460.

⁵ This presumption is not now invariably justifiable. In some foreign countries an English bankruptcy might be allowed to operate on immovables situate in such countries. See *Westlake*, p. 157, and compare *Hoffmann v. Mack*, *Journal de Droit Int. Privé*, 1879, vi. p. 77, cited *Piggott*, p. 484.

"there situate. Even in the case of real property outside England within Her Majesty's dominions, as, for instance, in the colonies, such property will only pass according to the law of the colony where it is situate,¹ and the trustee, therefore, in a colony where registration is necessary to pass the title, will get no title until registration.² The property will only vest in the trustee subject to any requirements prescribed by the local law as to the conditions necessary to effect a transfer of real estate situate in the locality. Section 168 [of the Bankruptcy Act, 1883] will, however, probably make a practical alteration in one way even as to real property situate abroad, that is to say, that in cases where the bankrupt is personally within the jurisdiction of the Court, he may be ordered, within section 24, to execute a valid conveyance of his real property according to the form required by the law of the country where such property is situate; whereas under the former statutes, which did not vest real property abroad, it was held that the bankrupt was under no obligation, legal or equitable, to execute³ a conveyance."⁴

The effect, therefore, of an English bankruptcy on foreign immovables, or, in other words, foreign land, may be summed up as follows:—

The bankruptcy operates as an assignment of any land situate within the British dominions, *e. g.*, in Scotland, Victoria, or Canada.⁵

The bankruptcy operates as an assignment of land situate in a country outside the British dominions, *e. g.*, Italy, in so far, and in so far only, as Italian law treats an English bankruptcy as an assignment of Italian land. A trustee under an English bankruptcy acquires in England a title to land of the bankrupt in Italy if his title is recognised by Italian law, and acquires no title to it at all if his title is not recognised by Italian law; in which case, it may be added, the Italian land does not form part of the fund available for distribution among the English creditors.⁶

¹ *Ex parte Rogers*, 1881, 16 Ch. D. (C. A.) 665.

² *Callender v. Colonial Secretary of Lagos*, [1891] A. C. 460.

³ *Selkirk v. Davis*, 1814, 2 Rose, 97, 291.

⁴ *Williams, Bankruptcy*, 6th ed., p. 190.

⁵ See the Bankruptcy Act, 1883, ss. 117–119, as to the aid to be given to each other by Bankruptcy Courts in different parts of the British dominions.

⁶ See *Cockerell v. Dickens*, 1840, 3 Moore P. C. 98. Mr. Baldwin arrives, it is conceived, at the same conclusions. "All such real property," he writes, "of the bankrupt as is situate in any portion of Her Majesty's dominions passes to his trustee; but if elsewhere, not unless the trustee has a claim,

(2) *As to movables.* — An English bankruptcy operates as an assignment to the trustee of the movables (*e. g.*, goods) of the bankrupt situate in any part of the British dominions, and also, in so far as our Courts can determine the matter, of his movables situate in countries not forming part of the British dominions.

The extra-territorial effect of an English bankruptcy gives rise to several questions : —

Question 1. — What is the position in England of a creditor who, after the commencement of the bankruptcy, obtains in a foreign country payment of debts due to him from the bankrupt?

English Courts cannot directly determine what shall be, in a foreign country, the effect of an English bankruptcy. They may, however, be called upon indirectly to pronounce a decision on the point. *X*, a creditor of the bankrupt, may, after the commencement of the bankruptcy, obtain in a foreign country payment of debts due to him from the bankrupt. *X* may then come to England and be sued here by *A*, the trustee in bankruptcy, for the money so obtained. Our Courts must then decide between the title of *X*, the creditor, and *A*, the trustee, or in substance must determine what is the effect of an English bankruptcy in a foreign country. From the cases decided on the subject, it may, with considerable probability, but not with absolute certainty, be inferred¹ that English Courts adhere to the following principles : —

First. Any creditor who, after the commencement of the English bankruptcy,² without legal process obtains in a foreign

“to it under the law of the particular foreign country where situate.” *Baldwin, Bankruptcy*, 4th ed., p. 114.

¹ This inference, grounded on the three cases, *Hunter v. Potts*, 1791, 4 T. R. 182; *Sill v. Worswick*, 1791, 1 H. Bl. 665; *Philips v. Hunter*, 1795, 2 H. Bl. 402, which were decided at a time when the bankruptcy law was different from what it is at present, and when points connected with the conflict of laws had been little studied, is to a certain extent conjectural. The necessary result of these cases, though not all which may be inferred from them, is thus stated by Bell : “In England . . . it is held (1) That an English creditor who, having notice of the bankruptcy, makes affidavit in England in order to proceed abroad, cannot retain against the assignees what he recovers; (2) That a creditor in the foreign country would not, if preferred by the laws of that country, be obliged to refund in England; and (3) That, at all events, such a creditor cannot take advantage of the bankrupt laws in England without communicating the benefit of his foreign proceedings.” 2 *Bell, Commentaries on the Law of Scotland* (McLaren’s ed.), p. 573.

² See Bankruptcy Act, 1883, s. 43. *Ex parte D’Obree*, 1803, 8 Ves. 81. As to what acts constitute acts of bankruptcy, see Rule 58, p. 299, *ante*.

It would seem that the rules of the English Bankruptcy Act as to relation apply at any rate to transactions taking place in foreign countries, such as Scotland or Victoria, which form part of the British dominions. See, further, chap. xxviii., comment on Rule 177, *post*; but conf. *Goudy*, 2nd ed., p. 641.

country payment of a debt due to him from the bankrupt, may, when sued in an English Court by the trustee, be compelled to refund the money paid to him.¹

Secondly. If any creditor, after the commencement of the English bankruptcy, recovers in a foreign country a debt due to him from the bankrupt, the effect of such recovery will depend on the answer to the question whether the foreign Court did or did not determine that the title of the creditor was good as against the title of the trustee.

If the creditor recovered the debt under circumstances which did not necessarily involve the preference by the foreign Court of his title to that of the trustee (as where the creditor recovered the money due to him from the bankrupt without notice to the Court of the fact of the bankruptcy), then the creditor is to be held, when sued here, to have recovered the money to the use of the trustee, and is liable to refund it. There would appear in this case to be no difference between the position of an English and of a foreign creditor.²

If the creditor recovered the debt under circumstances which necessarily involved the preference by the foreign³ Court of his title to that of the trustee, as where the fact of the bankruptcy is brought before the Court, or the trustee takes part in the proceedings, then the creditor, though the decision of the foreign Court is in point of principle erroneous, has the advantage of the judgment in his favour,⁴ and, if sued here by the trustee, cannot be compelled to refund the money recovered in the foreign country.

¹ The authorities show "that the operation of the bankrupt laws, with respect to the personal property of the bankrupt, when that property is brought into this country by any one who has obtained it, is to carry a right to recover it to the assignees for the benefit of all the creditors." *Sill v. Worswick*, 1791, 1 H. Bl. 665, 694, per *Loughborough*, L. C. J.

² See *Sill v. Worswick*, 1791, 1 H. Bl. 665, 693; *Philips v. Hunter*, 1795, 2 H. Bl. 402.

³ This must almost necessarily be a "foreign" Court in the strictest sense of the term, i. e., a Court of a country not forming part of the British dominions; for the Court of any country forming part of the British dominions, e. g., a colonial Court, must under the Bankruptcy Act, 1883, prefer the title of the trustee. *Callender v. Colonial Secretary of Lagos*, [1891] A. C. 460.

⁴ This is almost involved in the principle of such cases as *Cammell v. Sewell*, 1860, 5 H. & N. 728; 29 L. J. (Ex.) 350; *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414; *In re Queensland, &c. Co.* [1891] 1 Ch. 536, 545; [1892] 1 Ch. (C. A.) 219; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238, which, though they have no direct reference to bankruptcy, determine that a title acquired under a foreign judgment is valid here. See *Phillimore*, s. 770, 3rd ed., pp. 617, 618, and compare *Foot*, 2nd ed., pp. 306, 307.

"It by no means follows," says Lord Loughborough, "that a commission of bankrupt has an operation in another country against the law of that country. I do not wish to have it understood that it follows as a consequence from the opinion I am now giving (I rather think that the contrary would be the consequence of the reasoning I am now using) that a creditor in that country, not subject to the bankrupt laws [of England], nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees, he would clearly not be liable. But if the law of that country preferred him to the assignee, though I must suppose that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle on which that law so decided."¹

Thirdly. A creditor who has recovered or received abroad any

¹ *Sill v. Worswick*, 1791, 1 H. Bl. 665, 693, per *Loughborough*, L. C. J.

Westlake's view. Mr. Westlake places a different interpretation on the decided cases, and his view deserves the most careful consideration.

"§ 142. A British creditor," he writes, "or one domiciled in England, or one who in his character of creditor must be regarded as English because the debt is owed to a house of business in England of which he is a member, and who after the commencement of an English bankruptcy, and not by virtue of any charge prior to the bankruptcy, obtains payment out of the bankrupt's movables in a non-British country, must pay over the amount to the trustees in the bankruptcy, whether or not he seeks to receive dividends on the residue, if any, of his debt, whether or not the payment was obtained by legal proceedings, and whether or not the title of the trustees was asserted in such proceedings, if any.

"§ 143. A creditor not being such as is described in the last §, who, after the commencement of an English bankruptcy, and not by virtue of any charge prior to the bankruptcy, obtains payment out of the bankrupt's movables in a non-British country, must account for such payment if he seeks to receive dividends on the residue, if any, of his debt, but may otherwise retain it; and this whether or not the payment was obtained by legal proceedings, and whether or not the title of the trustees was asserted in such proceedings, if any."

Westlake, 3rd ed., ss. 142, 143, pp. 158, 159. See *Story*, s. 409. But contrast *Foote*, 2nd ed., pp. 305-307.

Mr. Westlake's view, which makes the right of a creditor to retain the payment he has obtained in effect depend on his "national character," may be sound, but is open to some objections. His doctrine is not, it is submitted, established by any reported case. His definition of what I have termed "national character" is vague. His doctrine, lastly, is not easily reconcilable with the respect now paid to a foreign judgment *in rem*. See *Foote*, pp. 306, 307.

part of the bankrupt's movable property, or any part of his immovable property, which forms part of the fund available for distribution among his creditors, will not be allowed to prove under the English bankruptcy unless he brings into the common fund the part so acquired.¹

"If a particular creditor who is able to lay hold of assets of the bankrupt abroad comes here to share with the other creditors, he must bring into the estate here that which the law of the foreign country has given him over the other creditors."²

This principle applies as well to an alien as to a British subject; it applies whether the advantage be gained by means of an attachment, by proof under a foreign bankruptcy, or otherwise. It applies, however, only to property which otherwise would have passed, or which at any rate according to the view of our Courts ought to have passed, to the trustee, so as to form part of the fund available for distribution among the creditors under the English bankruptcy.³ It does not, therefore, apply to immovable property of the bankrupt's situate in a country beyond the limits of the British dominions, if such property does not pass to the trustee under the law of such country, *e. g.*, France.⁴

*Question 2*⁵—Can the Courts of any country forming part of the British dominions treat an English bankruptcy as invalid, and, therefore, as having no extra-territorial effect, on the ground that the English Bankruptcy Court has exceeded the jurisdiction which, in the opinion of, *e. g.*, Scotch or Victorian judges, is conferred upon it by the English Bankruptcy Act?

The answer to this question, should it ever call for decision, probably is that any Court throughout the British dominions must treat an English bankruptcy, as far at any rate as the authority of the Court is concerned, as valid. If the English Court has misconstrued the Act, and made bankrupt a debtor

¹ See *Ex parte Wilson*, 1872, L. R. 7 Ch. 490; *Selrig v. Davis*, 1814, 2 Rose, 291; *Cockerell v. Dickens*, 1840, 3 Moore P. C. 98; *Westlake*, 3rd ed., pp. 158, 159.

² *Ex parte Wilson*, 1872, L. R. 7 Ch. 490, 493, judgment of James, L. J.

³ *Cockerell v. Dickens*, 1840, 3 Moore P. C. 98.

⁴ The principles governing the position of the creditor of a bankrupt, who in a foreign country obtains payment of a debt, apply to the position of a creditor who in a foreign country obtains property of the bankrupt, *e. g.*, movables, forming part of the fund distributable among the creditors. See language of *Loughborough*, L. C. J., in *Sill v. Worswick*, 1791, 1 H. Bl. 665, 694, cited p. 338, note 1, *ante*.

⁵ Exactly the same question in principle may be raised as to the right of an English Court to treat a Scotch or Irish bankruptcy as invalid.

whom, *e. g.*, as not being a debtor subject to the English bankruptcy law,¹ the Court has no jurisdiction to adjudge bankrupt, the right course for any person aggrieved by the error of the Court is to appeal to the proper English appellate tribunals, and the Courts of Scotland or of Victoria will not, it is conceived, act in effect as Courts of appeal from the decision of an English Bankruptcy Court. The correctness of this suggested reply is, however, by no means certain; nor does it, even if correct, necessarily apply to objections to the exercise of bankruptcy jurisdiction by the English Court, which are based on the adjudication of bankruptcy having been pronounced under a mistaken view of the facts, as where the English Court holds that the bankrupt is domiciled in England, whereas he is, in fact, domiciled in Scotland, or which are based on the ground that the adjudication of bankruptcy was obtained by fraud.

Illustrations.

In the following illustrations *N* is a debtor made bankrupt under the English Bankruptcy Act, 1883.

1. *N*, at the time of his being adjudicated bankrupt, possesses movables, *viz.*, money and debts, owing to him in Scotland, Victoria, and France. The bankruptcy is an assignment to the trustee in bankruptcy of such money and debts.²

2. *N*, at the time of his being adjudicated bankrupt, possesses land in Scotland, the Isle of Man, and in Victoria. The bankruptcy is an assignment to the trustee of such land.³

3. *N*, at the time of his being adjudicated bankrupt, possesses land and railway shares in a British colony, under the law of which the transfer of the land and of the shares is not complete without registration. The bankruptcy is an assignment to the trustee of the right to the land and shares, subject to the necessity for registration, and the title of the trustee is not complete until the transfer is registered.⁴

4. *N*, at the time of his being adjudicated bankrupt, possesses

¹ See chap. viii., Rule 53, p. 286, *ante*. The supposed question might have arisen under the Act of 1869 with regard to a case such as *Ex parte Crispin*, 1873, L. R. 8 Ch. 374, or, under the Bankruptcy Act, 1883, with regard to a case such as *In re Pearson*, [1892] 2 Q. B. (C. A.) 263, had the decision of the English Court been against the appellant.

² See p. 337, *ante*.

³ See pp. 335, 336, *ante*.

⁴ See pp. 334, 335, *ante*, and *Callender v. Colonial Secretary of Lagos*, [1891] A. C. 460.

land in Italy. The English bankruptcy is an assignment of such land to the trustee in so far as it is an assignment under the law of Italy, but not otherwise.¹

5. *N*, after the commencement of the bankruptcy, but a month before he is adjudicated bankrupt, possesses goods and money in Scotland and in Victoria. The bankruptcy is an assignment to the trustee in bankruptcy of such goods and money to the same extent to which it would have been an assignment if the goods and money had been situate² in England.

6. *X*, a creditor, obtains without legal process in France from *N*, after he is adjudicated bankrupt, payment of a debt due from *N* to *X*. On *X*'s coming to England he is sued by *A*, the trustee, for the amount of the money paid him by *N*. *A* can recover from *X* the money paid by *N*.³

7. After *N* is adjudicated bankrupt *X* recovers by proceedings in a Pennsylvanian Court £100 due from *N* to *X*. The Court has no notice of the bankruptcy, and there is nothing to show that the Court intended to give a judgment as to *X*'s title, as against *A*, the trustee in bankruptcy. *X*, on coming to England, is sued by *A* for the £100. *A* can recover the £100 as money received to his use by *X*.⁴

8. After *N* is adjudicated bankrupt, *X*, an American domiciled in Pennsylvania, recovers by proceedings in a Pennsylvanian Court £100 due from *N* to *X*. *Y*, an Englishman domiciled in England, also recovers by proceedings in the same Court £50 due to him from *N*. The Court has, in both cases, notice of the bankruptcy, and holds that the title of each of the creditors is better than the title of *A*, the trustee in bankruptcy. *X* and *Y* come to England, and *A*, the trustee, sues each of them for the money obtained under the Pennsylvanian judgments. *A* certainly cannot recover the £100 from *X*, the American. Probably he cannot recover the £50 from *Y*, the Englishman, but this is not certain.⁵

9. *X*, the American creditor, under the circumstances stated in Illustration 8, attempts to prove under *N*'s bankruptcy for a fur-

¹ See pp. 335, 336, *ante*.

² As to the effect of English bankruptcy on antecedent transactions, see Bankruptcy Act, 1883, ss. 43, 45-49.

³ Conf. judgment of Lord *Loughborough* in *Sill v. Worswick*, 1791, 1 H. Bl. 665, 689.

⁴ *Sill v. Worswick*, 1791, 1 H. Bl. 665, 689; *Philips v. Hunter*, 1795, 2 H. Bl. 402.

⁵ If Mr. Westlake's view of the law be correct, *A* can recover the £50 due from *Y*. See p. 339, note 1, *ante*.

ther sum of £500 due from *N* to *X*. He will not be allowed to prove unless he pays over to *A*, the trustee, the £100 recovered.¹

(ii) *As a Discharge.*

RULE 67.²—A discharge under an English bankruptcy from any debt or liability is, in any country forming part of the British dominions, a discharge from such debt or liability wherever or under whatever law the same has been contracted or has arisen.

II. WINDING-UP.

RULE 68.³—The winding-up of a company impresses the whole of its property with a trust for application in the course of the winding-up, for the benefit of the persons interested in the winding-up (?).

Comment.

The winding-up of a company under the Companies Acts impresses the whole of the assets of the company with a trust for application in the course of the winding-up,⁴ and the English Court will, in as far as lies within its power, cause the property of

¹ See pp. 339, 340, *ante*.

² See *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228. For the comment on and illustrations of this Rule, see chap. xvii., Rules 111–114, *post*, where the whole of the Rules as to the extra-territorial effect of bankruptcy as a discharge are laid down and explained.

³ See *Westlake*, 3rd ed., p. 154; *In re Oriental Inland Steam Co. — Ex parte Scinde Ry. Co.* 1874, L. R. 9 Ch. 557. Compare *Lindley, Company Law*, 5th ed., p. 666. See, further, the Companies (Winding-up) Act, 1890, 53 & 54 Vict. cap. 63, especially as to liquidator, ss. 4, 12–24. It is, however, apparently suggested by *Westlake*, p. 154 and p. 151, that this rule applies only where the company is one which is domiciled in England, i. e., “which derives its incorporation, or other legal existence, from the law of England, or from British law as connected with England rather than with any other part of the Empire.” *Westlake*, p. 151. As to a company which is not domiciled in England, “it is difficult to suppose,” he writes, “that either its movable or its immovable property, situate out of England, could be strictly considered as passing by such winding-up, though it might very likely, for convenience, be administered in the English Court as long as there was not a concurrent winding-up in the company’s domicile.” *Westlake*, p. 155. As to jurisdiction to wind up a company, see Rules 59, 60, pp. 303, 305, *ante*.

⁴ Compare *Westlake*, pp. 154, 155.

the company to be treated as trust property, to be dealt with for the benefit of the persons interested in the winding-up. Thus, where a company having its chief office in England, but carrying on business in India, was ordered to be wound up, judgment creditors in this country who had proved under the winding-up were not allowed to attach property of the company in India, and the law was thus laid down:—

“The winding-up is necessarily confined to this country. . . . The English Act of Parliament has enacted that, in the case of a winding-up, the assets of the company so wound up are to be collected and applied in discharge of its liabilities. That makes the property of the company clearly trust property. It is property affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased to be beneficially the property of the company, and, being so, it has ceased to be liable to be seized by the execution creditors of the company.

“There may, no doubt, be some difficulty in the way of dealing with assets and creditors abroad. The Court abroad may sometimes not be disposed to assist this Court, or take the same view of the law as the Courts of this country have taken as to the proper mode of dealing with such companies, and also with such assets. If so, we must submit to these difficulties when they occur.

“In this particular case there is no such difficulty. There were assets fixed by the Act of Parliament with a trust for equal distribution amongst the creditors. One creditor has, by means of an execution abroad, been able to obtain possession of part of those assets. The Vice-Chancellor was of opinion that this was the same as that of one *cestui que trust* getting possession of the trust property after the property had been affected with notice of the trust. If so, that *cestui que trust* must bring it in for distribution among the other *cestuis que trust*. So I, too, am of opinion that these creditors cannot get any priority over their fellow-creatures by reason of their having got possession of the assets in this way. The assets must be distributed in England upon the footing of equality.”¹

¹ *Ex parte Scinde Ry. Co.* 1874, L. R. 9 Ch. 557, 558, 559, judgment of James, L. J. See *Lindley, Company Law*, 5th ed., p. 678, and *Flack's Case*, [1894] 1 Ch. 369.

(C) ENGLISH GRANT OF ADMINISTRATION.¹

RULE 69.² — An English grant has no direct operation out of England.

This Rule must be read subject to Rules 73 to 75.³

Comment.

"It must not be understood . . . that where a testator dies domiciled in England, leaving assets abroad, the grant of probate here [or of letters of administration] can extend to them. For the probate [or letters of administration were] never granted except for goods which, at the time of the death, were within the jurisdiction of the Ordinary who made the grant."⁴

An English grant does not, in short, of itself enable the personal representative even of a man who has died domiciled in England to sue in a foreign Court.⁵

RULE 70.⁶ — An English grant extends to all the movables of the deceased, wherever situate, at the time of his death, at least in such a sense that a person who has obtained an English grant (who is hereinafter called an English administrator) may —

- (1) sue in an English Court in relation to movables of the deceased situate in any foreign⁷ country ;

¹ *Williams, Executors*, 9th ed., 300–302, and especially, *Westlake*, 3rd ed., pp. 109–111 ; *Foote*, pp. 270, 275–277 ; *Nelson*, 202, 216, 217. For jurisdiction to make a grant, see Rules 61 and 62, pp. 311, 316, *ante*.

² See *Williams, Executors*, 9th ed., pp. 300–302 ; *Atkins v. Smith*, 1740, Atk. 63.

³ See especially, as to extension of English grant to Ireland and to Scotland respectively, Rules 73, 74, p. 352, *post*, and as to extension to colonies, compare Rule 75, p. 354, *post*.

⁴ *Williams, Executors*, 9th ed., p. 300.

⁵ *Ibid.*, p. 302.

⁶ *Whyte v. Rose*, 1842, 3 Q. B. 493, 507 ; *Scarth v. Bishop of London*, 1828, 1 Hagg. Ecc. 625. "An English grant of probate or administration properly obtained here is, by the English Courts, regarded as extending to all the personal property of the deceased, wherever situate at the time of his death, at least in such a sense that a representative duly constituted in England may sue in England in relation to foreign assets." *Foote*, p. 270. This sentence accurately sums up the position of an English administrator, except that the word "movables" ought apparently to be substituted for "personal property," as an English administrator could not bring an action in England in relation, e. g., to leaseholds situate in New York. See Rule 39, pp. 214, 215, *ante*.

⁷ And of course if situate in England.

- (2) receive¹ or recover in a foreign country movables of the deceased situate in such country (?).

Comment.

Though the jurisdiction of the Court to make a grant arises from there being personal property of the deceased (however small in amount) situate in England,² an ordinary grant³ constitutes the administrator the representative of the deceased, not only in respect of the property the presence of which in England gave the Court jurisdiction, but also in respect of the whole of the deceased's movable⁴ property.⁵ No doubt there is some difficulty in determining what is the precise effect of an English grant on property situate abroad, and the question what is its effect is further considered in the comment on Rule 72.⁶ Thus much, however, appears to be certain. An English administrator can sue in an English Court in respect of movables of the deceased situate abroad, *e. g.*, in Victoria or in France; nor would it here be any answer to an action by the administrator in respect of such movables that the deceased did not die domiciled in England. The administrator, further, has, as far as English Courts are concerned, the right to receive or recover in a foreign country movables of the deceased. But it of course depends on the law, not of England, but of the foreign country, whether he has there, in accordance with its law, the right to receive such movables.

Illustrations.

In the following illustrations *A* is the administrator of *T* under an English grant:—

¹ See *Atkins v. Smith*, 1740, 2 Atkyna, 63.

² See Rule 62, p. 316, *ante*.

³ *I. e.*, a grant which is not in any way limited. See p. 316, note 2, *ante*.

⁴ Or rather "personal" property.

⁵ Compare especially, judgment of *Selborne, Ch.*, *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34, 40, 41.

"All personal property follows the person; and the rights of a person, constituted in England representative of a party deceased, domiciled in England, are not limited to the personal property in England, but extend to such property wherever locally situate. So, where general probate has been granted in England of the will of a domiciled Scotchman, the ordinary decree may be obtained here for administration of the personal estate without limiting it to the English assets." *Walker & Elgood*, 2nd ed., pp. 101, 102, citing *Stirling-Maxwell v. Cartwright*, 1879, 11 Ch. D. (C. A.) 522; *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34.

⁶ See p. 348, *post*.

1. *X*, a Frenchman resident in France, has before *T*'s death made a contract with *T*, which was to be performed in England, and has broken it. *A* can bring an action against *X* in England for the breach of contract.

2. *X*, a Frenchman, resident in France, converts in France goods of *T*. *X* comes to England. *A* can see *X* in England for the conversion.¹

3. *X*, an American living in New York, owes £100 to *T*. *A* has a right² to receive payment of the debt from *X*, and *A* has also a right to recover payment of the £100 from *X* by any proceedings in the Courts of New York which are allowed by the law of New York, *e. g.*, by obtaining in New York a grant of administration, and bringing an action there against *X*.

RULE 71.³— When a person dies domiciled in England, the Courts of any foreign country ought, by means of a grant,⁴ or otherwise, to enable the English administrator to act as personal representative of the deceased in such foreign country.

Comment.

An English Court has no power to dictate to the tribunals of foreign countries what is the course which they ought to pursue. According, however, to the doctrines of English law, the beneficial succession to a deceased person's movables is governed by the law of his domicile (*lex domicilii*),⁵ and the Courts of his domicile have primary, though not exclusive, jurisdiction to determine the succession to such movables ;⁶ it follows, therefore, that the representative under an English grant of a deceased person who has died domiciled in England ought, in the opinion of English judges, to be placed by the Courts of any foreign country, where the deceased has left movable property, in a position there to represent the deceased. The claim, however, of the English administrator of a person who has died domiciled in England, to be made representative of the deceased in a foreign country, is by no means

¹ *Whyte v. Rose*, 1842, 3 Q. B. 493, 506.

² *I. e.*, according to English law.

³ *Atkins v. Smith*, 1740, 2 Atk. 63 ; *Burn v. Cole*, 1762, Amb. 415.

⁴ For meaning of "grant," see Rule 61, p. 312, *ante*.

⁵ See chap. xxx., Rules 180-184, *post*.

⁶ See chap. xv., Rule 87, *post* ; *Enohin v. Wylie*, 1862, 10 H. L. C. 1 ; *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34 ; 1885, 10 App. Cas. 453.

an absolute one. "The grant of probate," it has been laid down, "does not, of its own force, carry the power of dealing with goods beyond the jurisdiction of the Court which grants it, though that may be the Court of the testator's domicile. At most it gives to the executor a generally recognised claim to be appointed by the foreign country or jurisdiction. Even that privilege is not necessarily extended to all legal personal representatives; as, for instance, when a creditor gets letters of administration in the Court of the domicile."¹

RULE 72.²—The following personal property³ of a deceased person passes⁴ to the administrator under an English grant:—

- (1) Any personal property of the deceased which at the time of his death is locally situate⁵ in England.⁶
- (2) Any personal property of the deceased received, recovered, or otherwise reduced into possession by the English administrator as such administrator.⁷

¹ *Blackwood v. The Queen*, 1882, 8 App. Cas. 82, 92, 93, judgment of Privy Council. See *In re Kloebe*, 1884, 28 Ch. D. 175, 179, judgment of Pearson, J.

At the present day, at any rate, our Courts would not expect that any foreign, *e. g.*, a colonial, Court should grant administration to the English administrator of a deceased person who did not die domiciled in England. See *Burn v. Cole*, 1762, Ambl. 415, 416, language of Lord Mansfield, C. J.

² See 1 *Williams, Executors*, 9th ed., pp. 300–302; *Ibid.*, 1523–1530; *Westlake*, 3rd ed., pp. 108–115; *Foote*, 2nd ed., pp. 269–277, 280; *Nelson*, pp. 202–217.

³ For definition of "personal property," see Rule 61, p. 311, *ante*.

⁴ Since the word "administrator" as here used includes an executor (see Rule 61, p. 311, *ante*), the term "passes" is not strictly correct; for the property of the deceased does not pass to the executor under the grant, but rather vests in him on the death of the testator (see p. 314, *ante*). Still the language employed in the Rule is convenient and usual (compare *Westlake*, 3rd ed., p. 108), and expresses what is meant, *viz.*, that certain property belongs to, and must be accounted for by, the administrator or executor who has obtained a grant.

⁵ As to local situation of personal property, see pp. 318–322, *ante*.

⁶ See 1 *Williams, Executors*, 9th ed., pp. 542–544; *Attorney-General v. Dimond*, 1831, 1 Cr. & J. 356, 370, judgment of Lyndhurst, C. B.

⁷ See *Dowdale's Case*, 1605, 6 Rep. 46 b, *nom. Richardson v. Dowel*, Cro. Jac. 55; *Westlake*, 3rd ed., p. 114; *Foote*, p. 280. See as to right of English administrator to receive or recover debts or other movables, Rule 70, p. 345, *ante*.

- (3) Any goods of the deceased which after his death are brought into England before any person has, in a foreign country where they are situate, obtained a good title thereto under the law of such foreign country (*lex situs*) [and reduced them into possession (?)].¹

Comment.

Whilst an English administrator is certainly in some respects regarded by our Courts as representing the deceased as regards the whole of his personal property wherever situate,² or, at any rate, in respect to so much thereof as consists of goods and choses in action, it is certainly not the whole of his personality, wherever situate, which passes immediately under the grant.³

With regard to the difficult question, what is the personal property of the deceased which passes under an ordinary English grant, the following points may, it is submitted, though with some hesitation, be considered as pretty well established : —

(1) Any personal property of the deceased, whether it consists of land, goods, or choses in action, which at the time of his death⁴ is locally situate⁵ in England, passes to the English administrator, and this even though not reduced into possession.⁶

(2) When personal property of the deceased is in fact received

¹ See chap. xxiii., Rule 140, *post*, and cases there cited, especially *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414, 429 ; *In re Queensland &c. Co.* [1891] 1 Ch. 536, 545, judgment of North, J. Contrast, however, *Westlake*, p. 110 ; *Story*, s. 516 ; and *White v. Rose*, 1842, 3 Q. B. 493, 506, dicta of Rolfe, B., and Parke, B.

For rights further of an English administrator, as against personal property in England in hands of foreign personal representative, see chap. xvii., Rule 118, and comment, *post* ; and as to title of foreign personal representative to movables of deceased, *Ibid.*, Rule 117, *post*.

² See Rule 70, p. 345, *ante*.

³ See, *e. g.*, *Attorney-General v. Hope*, 1834, 1 C. M. & R. 530, 560, 561, language of Lord Brougham.

⁴ "At the date of the grant?" *Westlake*, 3rd ed., p. 109. But this is hardly consistent with the rules as to liability to probate duty.

⁵ As to local situation of personal property for purpose of administration, see pp. 318–321, *ante*.

⁶ This seems to follow from the rules as to the incidence of probate duty, and the rules as to the jurisdiction of the Ecclesiastical Courts on which the incidence to probate duty originally depended. (See pp. 321, 322, *ante*.) See 1 *Williams, Executors*, 9th ed., pp. 542–544 ; *Attorney-General v. Dimond*, 1831, 1 Cr. & J. 356, 370, judgment of Lyndhurst, C. B.

or recovered by the English administrator as such, it of course passes to him and forms part of the fund to be administered in England; and this is so whether the property is received, or recovered by action in England, or received, or recovered by action in a foreign country,¹ provided always in the latter case that the property, *e. g.*, goods or debts, come into the hands of the administrator in his character of English administrator. This limitation should be noted, for movables, *e. g.*, goods or money, of which an English administrator gets possession in a foreign country, but not in his character of English administrator, do not pass to him under the grant. Thus, if the deceased dies domiciled in England and his English administrator obtains a grant in Victoria and there recovers debts due to the deceased, the amount recovered comes into his hands as Victorian administrator; he must administer it according to the law of Victoria,² and the only portion which passes to him under the English grant is that part (if any) which under Victorian law comes to or remains in his hands for administration in England, *i. e.*, which he holds in his character of English administrator.

(3) Any goods of the deceased, *e. g.*, furniture or a watch, which are brought into England after his death, before any person has, under the law of a foreign country where they are situate, obtained a good title to them, pass to the English administrator; and goods which belong to the deceased, but which after his death have in a foreign country, in accordance with the laws thereof, passed to and come into the possession of another person, *e. g.*, a purchaser, certainly do not on coming to England become the property of the English administrator. The question requiring consideration is whether goods of the deceased to which another person has in a foreign country obtained a title, *e. g.*, as foreign personal representative, without having taken them into possession, pass, on arriving in England, to the English administrator?³

(4) In cases in which a foreign personal representative can be made accountable in England for personal property of deceased in his hands in England,⁴ such personal property is recoverable in

¹ *Dowdale's Case*, 1605, 6 Rep. 46 b, *nom. Richardson v. Dowel*, Cro. Jac. 55; *Atkins v. Smith*, 1740, 2 Atk. 63. Compare, as to the general effect of an English grant, *Stirling-Maxwell v. Cartwright*, 1879, 11 Ch. D. (C. A.) 522; *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34; and consider especially, *Westlake*, pp. 114, 115, compared with *Story*, s. 514 a.

² See chap. xxix., Rule 178, *post*.

³ Compare *Westlake*, p. 110, and see further on this point chap. xvii., comment on Rule 117, *post*.

⁴ See chap. xvii., Rule 118, *post*.

England by, and constitutes assets in the hands of, the English administrator.¹

(5) Foreign lands or immovables do not pass under the English grant. No doubt the English administrator is regarded by our Courts as representing the deceased in respect of the whole of his personal property wherever situate,² but the title to foreign land cannot be adjudicated upon by English Courts,³ and the administration of such foreign lands or immovables as form part of a deceased person's personal property, must depend on the law⁴ of the country where the lands are situate, and the succession thereto must be regulated by the law of that country.⁵

Illustrations.

In the following illustrations *N* is the deceased, *A* is the English administrator.

1. *N* leaves leasehold property, and goods and bills payable to bearer, in England. They pass to *A*.

2. *N* leaves debts due to him from debtors resident in England. They pass to *A*.

3. *N* dies in a lodging at New York and leaves goods there which at *A*'s request are handed to *A* by the landlord of the house, who also pays *A* £100 due from the landlord to *N*. *A* has not constituted himself the representative of *N* under the law of New York. The goods and the money pass to *A*.

4. *A* recovers by action in England £100 due from *X*, a debtor living in New York, to *N*. The £100 passes to *A*.

5. *N* dies leaving goods in New York. *B* takes out administration to *N* in New York, and, as New York administrator, takes possession of the goods. *B* at New York sells them to a purchaser who brings them to England. They do not pass to *A*.

6. *N* dies in New York leaving there a watch and jewels. *B* takes out letters of administration in New York to *N*. After *B* has taken out letters of administration to *N*, but before *B* has

¹ See *Westlake*, pp. 112, 113; *Lowe v. Fairlie*, 1817, 2 Madd. 101; *Logan v. Fairlie*, 1825, 2 S. & St. 284; *Sandilands v. Innes*, 1829, 3 Sim. 263; *Tyler v. Bell*, 1837, 2 My. & Cr. 89; *Bond v. Graham*, 1842, 1 Hare, 482.

² *Stirling-Maxwell v. Cartwright*, 1879, 11 Ch. D. (C. A.) 522; *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34; 1885, 10 App. Cas. 453, 467. See App., Note 14, *The Ewing v. Orr Ewing Case*.

³ See p. 214, *ante*.

⁴ See Rules 82, 86, 178, *post*.

⁵ See *Duncan v. Lawson*, 1889, 41 Ch. D. 394, and Rule 138, *post*.

taken possession of the watch and jewels, *X*, the son of *N*, brings them to England. Whether they pass to *A*?¹

Extension of English Grant to Ireland and Scotland.

RULE 73.²—An English grant³ will, on production of the said grant to, and deposition of a copy thereof with, the proper officer of the High Court of Justice in Ireland, be sealed with the seal of the said Court, and be of the like force and effect, and have the same operation in Ireland, as a grant of probate or letters of administration made by the said Court.

The latter grant is hereinafter referred to as an Irish grant.

Comment.

An English grant may be extended to Ireland under this Rule, whatever be the domicile of the deceased.⁴

RULE 74.⁵—An English grant made to the administra-

¹ The reason they ought not to pass is, that before arriving in England they have become the goods of *B*; but see *contra*, *Westlake*, p. 110. "If property came to England after the death, would the foreign administration give a 'right to it?' " *Whyte v. Rose*, 1842, 3 Q. B. 493, 506, per *Rolfe*, B. "Suppose, after a man's death, his watch be brought to England by a third party, could such party, in answer to an action of trover by an English administrator, plead that the watch was in Ireland at the time of the death?" *Ibid.*, per *Parke*, B.

² "From and after the [1st day of January, 1858], when any probate or letters of administration to be granted by the Court of Probate in England shall be produced to, and a copy thereof deposited with, the Registrars of the Court of Probate in Ireland, such probate or letters of administration shall be sealed with the seal of the said last-mentioned Court, and, being duly stamped, shall be of the like force and effect, and have the same operation in Ireland, as if it had been originally granted by the Court of Probate in Ireland." Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 Vict. cap. 79), s. 94.

See further, the Judicature Act (Ireland), 1877, 40 & 41 Vict. cap. 57. Compare the Finance Act, 1894 (57 & 58 Vict. cap. 30), ss. 1, 6, 22.

³ For meaning of "English grant," see Rule 61, p. 312, *ante*.

⁴ Contrast Rule 74 as to the extension of an English grant to Scotland.

⁵ "From and after the date aforesaid [12th Nov. 1858], when any probate or letters of administration to be granted by the Court of Probate in England to the executor or administrator of a person who shall be therein, or, by any note or memorandum written thereon signed by the proper officer, stated to have died domiciled in England, or by the Court of Probate in Ireland to

tor of any person duly stated to have died domiciled¹ in England will, on production of the said grant to, and deposition of a copy thereof with, the clerk of the Sheriff Court of the County of Edinburgh, be duly indorsed with the proper certificate by the said clerk, and thereupon have the same operation in Scotland as if a confirmation had been granted by the said Court.

Comment.

In accordance with this Rule, an English grant may, when the deceased dies domiciled in England, by formal proceedings, be extended to Scotland, so as to have there the operation of a "confirmation," which is the equivalent, under Scotch law, to a grant of probate or letters of administration.

The general effect of the Confirmation and Probate Act, 1858, on the fourteenth section of which² our Rule is grounded, has been thus stated :—

"The statute of 1858 was passed for the double object of simplifying the procedure necessary, in Scotland for confirmation, and in all parts of the United Kingdom for what it may be convenient to call ancillary administrations; and of enabling, in the latter class of cases, a single stamp, denoting the duty payable on the aggregate value of the whole personal estate within the United Kingdom, to be placed upon the principal grant, whether of probate or administration in England or Ireland, or of confirmation in Scotland; the latter object being purely fiscal. For the purposes of that Act, *and for those purposes only* (as is expressly provided by section 17), a statement of the domicile of the deceased person in Scotland, or in England or Ireland, on the executor or administrator of a person who shall in like manner be stated to have died domiciled in Ireland, shall be produced in the Commissary Court of the County of Edinburgh, and a copy thereof deposited with the Commissary Clerk of the said Court, the Commissary Clerk shall indorse or write on the back or face of such grant a certificate, in the form, as near as may be, of the Schedule (F) hereunto annexed; and such probate or letters of administration, being duly stamped, shall be of the like force and effect, and have the same operation in Scotland, as if a confirmation had been granted by the said Court." Confirmation and Probate Act, 1858 (21 & 22 Vict. cap. 56), s. 14.

See further, the Judicature Act, 1873, 36 & 37 Vict. cap. 66, and the Sheriff Court (Scotland) Act, 1876 (39 & 40 Vict. cap. 70), ss. 35, 41, and compare the Finance Act, 1894 (57 & 58 Vict. cap. 30), ss. 1, 6, 22.

¹ Contrast Rule 73, p. 352, *ante*, as to extension of English grant to Ireland.

² As modified by subsequent enactments.

“the face of any interlocutor of the Commissary Judge granting confirmation, or of any probate or letters of administration granted in England or Ireland, is made conclusive evidence, that is, it is to determine conclusively which shall be deemed the principal grant, on which the duty on the whole personal assets within the United Kingdom is to be paid, and which is to be followed, in the rest of the United Kingdom, by the procedure substituted by the Act for that previously in use. The substituted procedure is the sealing or indorsement of the instrument bearing the stamp on which the duty has been paid, by the proper Court, in each of the other parts of the United Kingdom. It is clear, that if, in any case, the domicile should happen to be erroneously stated on the face of the instrument so sealed or indorsed, all parties interested may assert their rights, and pursue their remedies, in any forum which would have been competent if that Act had never been made; nor is there anything to alter or take away any such rights or remedies when the domicile is correctly stated.”¹

RULE 75.²—Whenever the Colonial Probates Act, 1892, is by Order in Council applied to any British possession, *i. e.*, to any part of the British dominions not forming part of the United Kingdom, adequate provision is made for the recognition in that possession of an English grant.

Comment.

“Her Majesty the Queen may, on being satisfied that the legislature of any British possession [*i. e.*, any part of the British dominions³ exclusive of the United Kingdom⁴] has made adequate provision for the recognition in that possession of probates and letters of administration [which terms include confirmation in Scotland] granted by the Courts of the United Kingdom,

¹ *Ewing v. Orr Ewing*, 1885, 10 App. Cas. 453, 512, language of Lord Selborne.

² 55 Vict. cap. 6, s. 1, and Interpretation Act, 1889 (52 & 53 Vict. cap. 63), s. 18, sub-s. 2.

³ For meaning of “British dominions,” see definitions, p. 65, *ante*.

⁴ “The expression ‘British possession’ shall mean any part of Her Majesty’s dominions, exclusive of the United Kingdom, and where parts of such dominions are under both a central and a local legislature; all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession.” Interpretation Act, 1889 (52 & 53 Vict. cap. 63), s. 18, sub-s. 2.

"direct by Order in Council that this Act [*i. e.*, the Colonial Probates Act, 1892] shall, subject to any exceptions and modifications specified in the Order, apply to that possession, and thereupon, while the Order is in force, this Act shall apply accordingly."¹

The effect of this enactment is that, whenever the Colonial Probates Act, 1892, which provides means for the recognition in the United Kingdom of probates and letters of administration granted in British possessions,² has been applied to a British possession, steps must also have been taken by the legislature of such British possession for the recognition there of probates and letters of administration granted by the Courts of the United Kingdom.

¹ Colonial Probates Act, 1892 (55 Vict. cap. 6), s. 1, with which read s. 6.

² See as to extension of colonial grant to England, chap. xvii., Rule 121, *post*.

NOTE.

LIS ALIBI PENDENS, STAYING ACTION.—When a plaintiff brings an action in respect of the same matter against the same defendant both in the High Court and in a foreign Court, then the High Court has, in the exercise of its discretion, and for the purpose of preventing vexatious proceedings, *jurisdiction* to stay the action or to compel the plaintiff to elect with which of the two actions he will proceed. (*M'Henry v. Lewis*, 1882, 22 Ch. D. (C. A.) 397; *Peruvian Guano Co. v. Bockwoldt*, 1883, 23 Ch. D. (C. A.) 225, 233, judgment of *Bowen*, L. J., with which contrast *Cox v. Mitchell*, 1859, 7 C. B. N. s. 55.) But this jurisdiction will not be exercised unless the plaintiff's proceedings are shown to be vexatious, or in violation of good faith. (*The Christiansborg*, 1885, 10 P. D. (C. A.) 141, 155. Conf. *Nelson*, p. 369.)

1. When the foreign Court is a Court of the United Kingdom, or (semble) of any country forming part of the British dominions, the plaintiff's proceedings are *prima facie* vexatious. (*M'Henry v. Lewis*, 1882, 22 Ch. D. (C. A.) 397, 408, judgment of *Bowen*, L. J.)

2. When the foreign Court is not a Court of any country forming part of the British dominions, then the plaintiff's proceedings are *prima facie* not vexatious (*Cox v. Mitchell*, 1859, 7 C. B. N. s. 55), though the defendant may show that they are so.

It is possible that, if a party who as plaintiff brings an action in a foreign country makes the same claim against the same parties here in the shape of a counter-claim, the case may under some circumstances be treated as that of a plaintiff who has brought concurrent actions in England and in a foreign country. (*Mutrie v. Binney*, 1887, 35 Ch. D. (C. A.) 614.)

(See, generally, *Westlake*, 3rd ed., pp. 357–359; *Foots*, 2nd ed., pp. 579–582; *Nelson*, pp. 368–371.)

AMERICAN NOTES.

CHAPTER X.

EXTRA-TERRITORIAL EFFECT OF

AMERICAN JUDGMENT;

AMERICAN BANKRUPTCY;

AMERICAN GRANT OF ADMINISTRATION.

(A) AMERICAN JUDGMENT.

A JUDGMENT of a court in the United States, like an English judgment, has no direct operation out of the jurisdiction in which it is rendered. It has no effect in another jurisdiction, except such as the law of such jurisdiction may allow. The only exception to this rule—an exception apparent rather than real, since the Federal Constitution and laws are part of the law of every separate jurisdiction in the United States—is the special effect accorded in each State, under the Constitution and laws of the United States, to judgments rendered in every other State. This subject is discussed *infra*, in the American Notes under chap. xvi.

(B) AMERICAN BANKRUPTCY.

1. UNDER NATIONAL BANKRUPTCY ACTS.—Under the Act of 1867, the assignment to the assignee in bankruptcy conveyed to the latter “all the estate, real or personal, of the bankrupt” (American Notes, *supra*, chap. viii.). But it was said that the certificate of discharge “does not discharge the bankrupt from debts contracted and made payable in a foreign country, unless the foreign creditors come in and prove their debts.” *Hilliard, Law of Bankruptcy and Insolvency*, ed. 1867, p. 286. See *Blumenstiel's Law and Practice in Bankruptcy*, 550, 551. Where a debt was contracted and payable in Canada by a resident of Vermont to a resident of Canada, it was held that the debt was not barred by a discharge under the National Bankrupt Act, the foreign creditor having neither been a party to the proceedings nor had personal notice thereof. *McDougall v. Page*, 55 Vt. 187; 45 Am. Rep. 602.

2. UNDER STATE BANKRUPTCY OR INSOLVENCY LAWS.—State bankruptcy or insolvency laws, though it may be their intention to reach all the property of the debtor, movable and immovable, wherever situate (*Chipman v. Peabody*, 159 Mass. 420; 34 N. E. 563; *Eddy v. Winchester*, 60 N. H. 63; *Crampton v. Valido Marble Co.* 60 Vt. 291; 15 Atl. 153; *Buller v. Goreley*, 146 U. S. 303; *Cole v. Cunningham*, 133 U. S. 107, 129), have of themselves no extra-territorial force; and while they may apply to all contracts made within the State by citizens thereof, subsequently to their enactment, they do not apply to contracts made within the State between a citizen thereof and a citizen of another State,

or to contracts not made within the State, *Baldwin v. Hale*, 1 Wall. 223; *Denny v. Bennett*, 128 U. S. 489; unless the contract not made within the State is between citizens of the State, *Marsh v. Putnam*, 3 Gray, 551; *Eustis v. Bolles*, 146 Mass. 413, 418; *Crampton v. Valido Marble Co.* 60 Vt. 291; 15 Atl. 153. Hence a discharge granted under such a law "cannot be pleaded in bar of an action brought by a citizen of another State in the Courts of the United States, or of any other State than that where the discharge was obtained," unless he voluntarily became a party to the proceedings. *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 Wall. 409, 410; *Denny v. Bennett*, 128 U. S. 489, 497; *Geilinger v. Philippi*, 133 U. S. 246; *Reynolds v. Adden*, 136 U. S. 348, 351; *Brown v. Smart*, 145 U. S. 454, 457. And some of the State Courts have held that it cannot in such case be pleaded as a bar even in the Courts of the State where it was obtained. *Rhodes v. Borden*, 67 Cal. 7, and cases cited; *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589; *Hills v. Carlton*, 74 Me. 156. See *Thomas v. Crow*, 65 Cal. 470. But where the insolvent and his creditor are both domiciled in such State, or the creditor, though non-resident, has voluntarily become a party to the proceedings, the discharge avails the insolvent "in all Courts and places." *Cole v. Cunningham*, 133 U. S. 107, 114; 10 Sup. Ct. Rep. 269; *Clay v. Smith*, 3 Pet. 411; *Murray v. Roberts*, 150 Mass. 353; *Columbia Falls Brick Co. v. Glidden*, 157 Mass. 175. And a person not a citizen of the United States, but domiciled in a State, with actual or constructive notice of the proceedings, is bound thereby. *Letchford v. Convillon*, 20 Fed. Rep. 608. See *Moore v. Horton*, 32 Hun, 393.

Yet each State, so long as it does not impair the obligation of any contract, has the power by general laws to regulate the disposition of all property, personal and real, within its limits and jurisdiction. *Smart v. Brown*, 145 U. S. 454, 457, and cases cited, especially *Crapo v. Kelly*, 16 Wall. 610, and *Denny v. Bennett*, 128 U. S. 489. And a provision of an insolvent law of a State that all conveyances, by way of preference, of any property within its borders, made by a citizen of the State, being insolvent, within a certain period before the commencement of proceedings in insolvency, shall be void, is valid as to all conveyances made after the passage of the law, whether to its own citizens or to citizens of other States. *Smart v. Brown*, 145 U. S. 454. The vesting of the property in the assignee in insolvency will prevail against the attachments of foreign creditors. *Owen v. Roberts*, 81 Me. 439; *Torrens v. Hammond*, 4 Hughes C. C. 596; *Pinckney v. Lanahan*, 62 Md. 447; *Orr v. Lisso*, 33 La. An. 476; *Mississippi Mills v. Ranlett*, 19 Fed. Rep. 191. In the leading case of *Kelly v. Crapo*, 16 Wall. 610, where a citizen of Massachusetts owning a ship which was registered in Massachusetts, but which was at the time on the high seas, was adjudged insolvent in that State, and all his property was judicially transferred to an assignee in insolvency, it was held that the ship could not be attached in New York in a suit subsequently brought against the insolvent by a New York creditor.

A court of equity may enjoin a citizen of the State from attaching elsewhere the property of a person against whom insolvency proceedings are pending. *Cole v. Cunningham*, 133 U. S. 107, 114; 10 Sup. Ct. Rep. 269; *Cunningham v. Buller*, 142 Mass. 47. Such an injunction was, however, refused where it was sought to restrain the resident creditor from enforcing a lien on real property in another State; *Jenks v. Ludden*, 34 Minn. 482. See *Hayden v. Yale*, 45 La. An. 363; 12 So. 633. On principles of comity the Courts of a State, the interests of its own citizens not being involved, may discharge an attachment

of property there, belonging to a person in respect of whom insolvency proceedings are pending in another State, by a citizen of the latter. *Eddy v. Winchester*, 60 N. H. 63 (1880). *Contra*, *Bank v. Lacombe*, 84 N. Y. 367; and dictum in *Sturtevant v. Armsby* (N. H.), 23 Atl. 368 (1891). But see *Gilman v. Ketcham*, 84 Wis. 60; 54 N. W. 395 (1893).

Where there are two bankruptcies or two insolvencies of the same person in different jurisdictions, the title of the assignee to land of the debtor must be determined by the *lex situs*, though the suit in which the question of title is raised is pending in the jurisdiction in which the assignee, who is the same person in both, was first appointed, and in which the judicial assignment purported to vest in him all the property of the insolvent. *Chipman v. Peabody*, 159 Mass. 420; 34 N. E. 563.

Where a receiver was appointed in New York for an insolvent life insurance company, and Virginia policy-holders, who had obtained, by similar proceedings in Virginia previously to such appointment, part payment of their policies from securities which had been deposited in that State for such contingencies, presented their unsatisfied claims to the New York receiver, it was held that the latter could not, in paying a dividend, charge such policy-holders with the amounts they had received in Virginia. *People v. Universal Life Ins. Co.* 42 Hun, 616. But it was held otherwise where the proceedings in Virginia were taken after the appointment of the receiver in New York. *People v. Knickerbocker Life Ins. Co.* 101 N. Y. 636, as stated in *People v. Universal Life Ins. Co.* 42 Hun, 616, 618, where the case is cited as *Hunt v. The Knickerbocker Life Ins. Co.*

Where a claim was disallowed by an assignee in insolvency, and no proper appeal was taken, it was held that such disallowance was a bar to recovery on a judgment previously obtained on the claim in another State. *State v. Kansas Ins. Co.* 32 Kan. 655.

The *situs* of debts due an insolvent is, for the purposes of insolvency proceedings, at the insolvent's domicile. *In re Dalpay*, 41 Minn. 532; 43 N. W. 564.

(C) AMERICAN GRANT OF ADMINISTRATION.

A grant of administration in one State confers no power beyond the limits of such State, and cannot authorise the administrator to maintain any suit in the Courts, state or national, held in any other State. *Johnson v. Powers*, 139 U. S. 156; *Wilkins v. Ellett*, 108 U. S. 256, 258. *A fortiori*, the powers of a public administrator are confined to the State from which he derives his authority. *Reynolds v. McMullen*, 55 Mich. 568; 54 Am. Rep. 386. Nor does the power given an executor by the will enable him to go into another jurisdiction and sue. *Graveley v. Graveley*, 25 S. C. 1. In such matters executors and administrators are on the same footing.

Where an administrator has been appointed at the domicile of the deceased, it is the practice to recognise him as the person to whom ancillary administration will be granted. *Wharton, Conf. of L.* s. 608; *Re Blancan*, 4 Redf. 151. But as between administrators appointed in different jurisdictions, whether they be different persons or the same person, there is no privity; and a judgment recovered against an administrator in one State is no evidence of debt, in a subsequent suit by the same plaintiff in another State, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. *Johnson v. Powers*, 139 U. S. 156, 159, and cases cited; *McGarvey v. Darnall*, 143 Ill. 367; 25 N. E. 1005;

Jones v. Jones, 39 S. C. 247; 17 S. E. 587; *Braithwaite v. Harvey* (Mont.), 36 Pac. 38. Some States, however, by statute recognise the authority of a foreign administrator to sue within their jurisdiction merely upon his filing with the proper Court a copy of his letters. See American Notes under chap. xvii. And "whatever matters are by the Courts of primary administration permitted to be litigated in the Courts of another State" are concluded by judgment in the latter. *Reynolds v. Stockton*, 140 U. S. 254; 11 Sup. Ct. 773.

The reason of the rule, that an administrator cannot sue as such in a jurisdiction in which he was not appointed, does not, however, rest upon any defect in his title in the property, but upon his incapacity by virtue of his appointment in one jurisdiction to sue in another. *Wilkins v. Ellett*, 108 U. S. 256; *Petersen v. Chemical Bank*, 32 N. Y. 21. The decedent's movables, though situate in different jurisdictions, are but components of one estate; and if an administrator sell, transfer, and indorse promissory notes or other written evidences of debt coming into his possession as administrator, the purchasers or indorseees may maintain actions in their own names against debtors in another State, except so far as the laws of the latter may prevent the assignee of a chose in action from suing in his own name. *Wilkins v. Ellett*, 108 U. S. 256, 259, and cases cited; *Abercrombie v. Stillman*, 77 Tex. 589; *Luce v. Manchester &c. Co.* 63 N. H. 588. See *Dial v. Gary*, 14 S. C. 573; 37 Am. Rep. 737. An administrator may even sue in his own name in another State on a note made to the intestate payable to bearer. *Wilkins v. Ellett*, 108 U. S. 256, and cases cited. He may also sue abroad in his individual capacity on a judgment obtained by him in his official capacity. *Tutman v. Thornton*, 107 Mo. 500; 17 S. W. 979.

On the same principle — that of the administrator's title — it is now held "almost universally that, although the executor or administrator of the domicile cannot maintain a *suit* in another State to recover personal property or collect a debt due the estate, yet he may take possession of such property peaceably without suit, or collect a debt if voluntarily paid; and that, if there is no opposing administration in the State where the property was situated, its courts will recognise his title as rightful, and protect it as fully as if he had taken out letters of administration there." *Putnam v. Pitney*, 45 Minn. 242, 246, and cases cited; *Schluter v. Bowery Savings Bank*, 117 N. Y. 125. See *Thurber v. Carpenter* (R. I.), 31 Atl. 5; *Louisville & N. R. Co. v. Brantley's Admr.* (Ky.) 28 S. W. 477. If a debtor residing in another State comes into the State in which an administrator has been appointed and there pays him, the payment is a valid discharge everywhere, even as against an administrator subsequently appointed in the State in which the deceased was domiciled, which is also the domicile of the debtor. *Wilkins v. Ellett*, 108 U. S. 256. And payment of a debt by the United States to the administrator appointed in the State in which the deceased was domiciled, whether made within or without the State, is good as against any administrator appointed elsewhere. *Wyman v. Halstead*, 109 U. S. 654.

A judgment of a Court in one State, determining the domicile of a testator and probating his will, is conclusive in other States, and gives the executors the right to prove the will in another State for purposes of ancillary administration, though a grant of administration has previously been made in the latter State. *Willet's Appeal*, 50 Conn. 330. See, also, *In re Miller's Estate* (Iowa), 61 N. W. 229. *Hardin's Estate v. Hardin* (Minn.), 61 N. W. 1018; *Clow v. Plummer*, 85 Mich. 550; *Dupoyster v. Gagani*, 84 Ky. 403; *In re Clay-*

son's Will, 24 Oregon, 542; 34 Pac. 358; *Clark v. Poor*, 73 Hun, 143; *Ives v. Salisbury*, 56 Vt. 565; *Van Gieson v. Banta*, 40 N. J. Eq. 14. Such a judgment, when duly proved, operates substantially as a revocation of an administration elsewhere granted, except as to portions of the estate already administered. *Thomas v. Morrisett*, 76 Ga. 384.

PART II.¹

JURISDICTION OF FOREIGN COURTS.

CHAPTER XI.

GENERAL RULES AS TO JURISDICTION.

RULE 76. — In this Digest

- (1) "Proper Court" means a Court which is authorised by the sovereign, under whose authority such Court acts, to adjudicate upon a given matter.
- (2) "Court of competent jurisdiction" means a Court acting under the authority of a sovereign of a country who, as the sovereign of such country, has, according to the principles maintained by English Courts, the right to adjudicate upon a given matter.

When in this Digest

- (i) it is stated that the Courts of a foreign country "have jurisdiction," it is meant that they are Courts of competent jurisdiction ;
- (ii) it is stated that the Courts of a foreign country "have no jurisdiction," it is meant that they are not Courts of competent jurisdiction.
- (3) "Foreign² judgment" means a judgment, decree, or order of the nature of a judgment (by whatever name it be called), which is pronounced or given by a foreign Court.³

¹ See as to the aim of the Rules in Part II., pp. 207, 208, *ante*.

² For the meaning of the word "foreign," see pp. 64, 68, *ante*.

³ This definition or description is suggested by *Piggott*, 2nd ed., p. 2 ; but

Comment.

(1) "*Proper Court*" and (2) "*Court of competent jurisdiction*."¹

(1) The term "proper Court" has reference to the intra-territorial competence of a Court, and means a Court authorised by the law of the country to which the Court belongs, or, in strictness, by the sovereign under whose authority the Court acts, to adjudicate about a given matter. Thus the Pennsylvanian Court of Common Pleas² is a "proper Court" for the purpose of divorcing persons resident, though not domiciled, in Pennsylvania, since the Court has under the law of Pennsylvania jurisdiction to divorce such persons. A proper Court is often designated, by English writers, a "Court of competent jurisdiction," but this is not the sense in which the expression "Court of competent jurisdiction" is used in this Digest.

(2) The term "Court of competent jurisdiction" refers, not to the intra-territorial, but to the extra-territorial³ competence of a Court, or rather to the extent to which the competence of a Court is admitted in any country other than the country to which the Court belongs. When thus used, as it constantly is by English writers, the term means a Court acting under the authority of the sovereign of a country who as sovereign thereof may rightly, according to the principles maintained by English law, determine or adjudicate upon a given matter. To put the same thing in other words, the term "Court of competent jurisdiction" means a Court belonging to a country the Courts whereof may rightly, according to the principles maintained by English Courts, determine or adjudicate upon a given matter. Thus the Courts of a country where married persons, whether British subjects or not, are domiciled, are Courts of competent jurisdiction to divorce such persons, since, according to the principles maintained by English tribunals, the Courts of the country where persons are domiciled, or rather the sovereign of such country acting through

it is not meant to include, as does his definition, an adjudication of bankruptcy or a grant of administration. He, moreover, confines his definition to a judgment pronounced by a Court of competent jurisdiction, which I have purposely not done.

¹ See Intro., p. 37, note 3, *ante*. Compare *Turnbull v. Walker*, 1893, 5 R. 132, 134, judgment of *Wright, J.*

² See *Green v. Green*, [1893] P. 89.

³ This distinction is drawn in somewhat different language by *Westlake*. See *Westlake*, 3rd ed., pp. 347-349.

his Courts, may rightly divorce such persons.¹ This is the sense in which the term "Court of competent jurisdiction" is used in this Digest.

The words in Rule 76, "as the sovereign of such country," are added to meet the case of countries, such as Scotland or Ireland, which are separate "countries" though forming part of one "state."² When our judges decide that the Court of Session is not a Court of competent jurisdiction for the divorce of persons domiciled in England, they of course do not decide that the sovereign of the United Kingdom has not a right to divorce such persons. What they do decide is that, according to the principles of English law, the sovereign of the United Kingdom has not, in the character of sovereign of Scotland and acting through the Scotch Courts, authority to grant a divorce to persons domiciled in England.³

(A) WHERE JURISDICTION DOES NOT EXIST.

(i) *In Respect of Persons.*

RULE 77. — The Courts of a foreign country have no jurisdiction over (*i. e.*, are not Courts of competent jurisdiction as against)

- (1) any sovereign,
- (2) any ambassador, or other diplomatic agent, accredited to the sovereign of such foreign country.⁴

¹ *Harvey v. Farnie*, 1882, 8 App. Cas. 43. Compare chap. vii., Rule 48, p. 269, *ante*, and chap. xiv., Rule 83, p. 387, *post*, and Intro., pp. 38-42, *ante*.

² As to the meaning of these terms, see pp. 66-68, *ante*.

³ A judgment, be it noted, given by a foreign Court of undoubtedly competent jurisdiction, may yet not be enforceable or have effect in England (see chap. xvi., Rules 90-92, *post*); and, on the other hand, a judgment given by a foreign Court, which is not a proper Court, but is a Court of competent jurisdiction, may (seem) be enforceable or have effect in England (see Rule 89, p. 400, *post*, and *Vanquelin v. Bouard*, 1863, 15 C. B. n. s. 341; 33 L. J. C. P. 78).

The question, further, when it comes before English judges, whether a foreign, *e. g.*, a French, Court is a Court of competent jurisdiction, is in reality always the question whether the French Courts are Courts of competent jurisdiction.

⁴ See *Hall, International Law*, ss. 49-53.

Comment.

(1) *As to a sovereign.*—“A sovereign, while within foreign territory, possesses immunity from all local jurisdiction in so far and for so long as he is there in his capacity of a sovereign. He cannot be proceeded against either in ordinary or extraordinary . . . tribunals.”¹ This principle, which is rigidly maintained by English Courts as regards their own jurisdiction,² would doubtless be maintained by them as regards the jurisdiction of a foreign Court over any sovereign.³

(2) *As to diplomatic agents.*—“The immunities from civil jurisdiction possessed by a diplomatic agent, though up to a certain point they are open to no question, are not altogether ascertained with thorough clearness.”⁴ In England it has apparently been generally held that, subject to certain limited exceptions, “his consent is required for the exercise of all local jurisdiction, and that consequently it can only assert itself in so far as he is willing to conform to its rules in non-contentious matters, or when he has chosen to plead to an action, or to bring one himself;”⁵ whilst the opinion has been maintained in other countries that a diplomatic agent, “in matters unconnected with his official position, . . . is liable to suits of every kind brought in the Courts of the country where he is resident, . . . and that consequently all property within the jurisdiction, other than that necessary to his official position, is subjected to the operation of the local

¹ *Hall*, s. 49.

² See Rule 38, p. 209, *ante*.

³ The right of a foreign (*e. g.*, a French) Court to entertain an action against a sovereign, *e. g.*, the King of Italy, could hardly call for decision in England, since, even were a judgment obtained against the King in France, it is certain that no action could be brought against him on the judgment in England. An English Court might, however, be called upon indirectly to determine whether a foreign Court was competent to entertain proceedings against the property of a foreign sovereign. If a case such as that of *The Constitution*, 1879, 4 P. D. 39, or *The Parlement Belge*, 1880, 5 P. D. (C. A.) 197, were to come before a French Court, and judgment were given by the French Court against the ship, an English Court might, on the ship coming into an English port, be called upon to determine what, if any, was the effect in England of the French judgment. If such a case should require decision, our Courts would, it is submitted, hold that the French Court was not a Court of competent jurisdiction, and that the judgment had no effect in England. But see Rule 140, *post*.

⁴ *Hall*, s. 50.

⁵ *Ibid.*, and see pp. 212, 213, *ante*.

"laws. Thus he is exposed, for example, to actions for damages "or breach of contract."¹ The question how far an English Court would admit the competence of a foreign Court to entertain such an action against a diplomatic agent accredited to the sovereign of the foreign country has never, it is believed, called for decision; but it is, to say the least, probable that our Courts, should the question come before them, would hold that the foreign Court had no jurisdiction. .

(ii) *In Respect of Subject-Matter.*

RULE 78.² — The Courts of a foreign country have no jurisdiction —

- (1) to adjudicate upon the title or the right to the possession, of any immovable not situate in such country, or
- [(2) (semble) to give redress for any injury in respect of any immovable not situate in such country (?).]

Comment.

As to clause 1. — "If the matter in controversy is land, or "other immovable property," writes Story, "the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation, as to all the matters of right and title which it professes to decide in relation thereto. This results from the very nature of the case; for no other Court can have a competent jurisdiction to inquire into or settle such right or title. By the general consent of nations, therefore, in cases of immovables, the judgment of the *forum rei sitæ* is held absolutely conclusive. '*Immobilia ejus jurisdictionis esse reputantur, ubi sita sunt.*' On the other hand a judgment in any foreign country, touching such immovables, will be held of no obligation."³

The undoubted rule in short is that, "if a Court pronounces a judgment affecting land out of its jurisdiction, the Courts of the country where it is situated, and it is presumed also the Courts of any other country, are justified in refusing to be bound by it, or to recognise it; and this even if the judgment proceed on the "*lex loci rei sitæ.*"⁴

¹ *Hall*, s. 50.

² See *Piggott*, 2nd ed., p. 139; *Story*, s. 591.

³ *Story*, s. 591.

⁴ *Piggott*, 2nd ed., p. 139.

This rule is merely an application of the more general principle that no Court ought to give a judgment the enforcement whereof lies beyond the Court's power, and especially if it would bring the Court into conflict with the admitted authority of a foreign sovereign, or, what is the same thing, the jurisdiction of a foreign Court.¹ English Courts, therefore, do not admit the decision of any foreign Court, *e. g.*, an Irish or a Scotch Court, to determine a person's title, under a will or otherwise, to English immovables, in which term must be included leasehold² no less than freehold property.

As to clause 2. — A question might be raised how far a foreign tribunal would be held by English Courts competent to entertain an action for injuries, *e. g.*, trespass, in respect of land in England. As our Courts do not entertain actions for trespass to foreign land,³ it is probable that they would deny the competence of a foreign Court to give damages for trespass to land in England, or for trespass to land in any foreign country to which the Court did not belong.

Illustrations.

1. *T*, by his will duly executed in 1842, devised all his real and personal estate to *A*. He had real estate in Ireland and also in England. The Irish Courts, it was held, had no jurisdiction to adjudicate upon the validity of the will as relates to the real estate in England; and a decree of the Irish Court of Chancery in 1852, after verdict upon an issue *devisavit vel non*, did not determine the validity or invalidity of the will, so far as it related to lands in England, and could not be pleaded in bar to a suit in the English Court of Chancery.⁴

2. *T*, domiciled in Ireland, leaves a will devising the whole of his real and personal estate to *A*. *T* dies possessed of lands both in Ireland and in England. The Probate Division of the Irish High Court has no jurisdiction to grant probate or make a decree under 20 & 21 Vict. cap. 79, ss. 65–67, so as to affect the rights of persons interested in the land in England (?).

¹ See Intro., pp. 38–40, *ante*.

² Compare *De Fogassieras v. Duport*, 1881, 11 L. R. Ir. 123.

³ *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602. See Rule 39, p. 214, *ante*.

⁴ *Boyse v. Colclough*, 1854, 1 K. & J. 124.

(B) WHERE JURISDICTION DOES EXIST.

RULE 79. — Subject to Rules 77 and 78, the Courts of a foreign country have jurisdiction (*i. e.*, are Courts of competent jurisdiction) —

- (1) in an action or proceeding¹ *in personam* ;²
- (2) in an action or proceeding *in rem* ;³
- (3) in matters of divorce, or having reference to the validity of a marriage ;⁴
- (4) in matters of administration and succession,⁵

to the extent, and subject to the limitations, hereinafter stated in the Rules having reference to each kind of jurisdiction.

¹ "Or proceeding" is added to cover any proceeding of the nature of an action.

² See chap. xii., Rules 80, 81, *post*.

³ See chap. xiii., Rule 82, *post*.

⁴ See chap. xiv., Rules 83–85, *post*.

⁵ See chap. xv., Rules 86, 87, *post*.

AMERICAN NOTES.

CHAPTER XI.

GENERAL RULES AS TO JURISDICTION.

SEE American Notes under chapters iv., v., and xvi. A judgment of a Court in one State, declaring the existence of a lien on real estate in another State, will not be enforced in the latter State. *Short v. Galway*, 83 Ky. 501. But a suit to remove a cloud upon title may be brought in a State other than that in which the land lies, since the decree operates upon the defendant *in personam*. *Remer v. McKay*, 54 Fed. Rep. 432.

CHAPTER XII.

JURISDICTION IN ACTIONS *IN PERSONAM*.¹

RULE 80. — In an action *in personam* in respect of any cause of action, the Courts of a foreign country have jurisdiction in the following cases : —

Case 1. — Where at the time of the commencement of the action the defendant was resident [or present ? ²] in such country, so as to have the benefit, and be under the protection, of the laws thereof.³

Case 2. — Where the defendant is, at the time of the judgment in the action, a subject of the sovereign of such country.⁴

Case 3. — Where the party objecting to the jurisdiction of the Courts of such country has, by his own conduct, precluded himself from objecting thereto ⁵ —

- (a) by appearing as plaintiff ⁶ in the action, or
- (b) by voluntarily appearing as defendant ⁷ in such action without protest, or

¹ *Story*, ss. 538–543, 546–549 ; *Westlake*, 3rd ed., pp. 344–349 ; *Foote*, 2nd ed., pp. 546–552 ; *Nelson*, pp. 352–365. See Intro., General Principle No. III., p. 38, and pp. 45–49, *ante*.

² *Carrick v. Hancock*, 1895, 12 Times L. R. 59.

³ *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155, 161 ; *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351, 371. Compare *Godard v. Gray*, 1870, L. R. 6 Q. B. 139.

⁴ *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155 ; *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351 ; *Douglas v. Forrest*, 1828, 4 Bing. 686.

⁵ See *Nelson*, pp. 361, 363 ; *Westlake*, 3rd ed., pp. 347–349 ; *Foote*, 2nd ed., pp. 547–552.

⁶ *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155, 161.

⁷ *Voinet v. Barrett*, 1885, 55 L. J. Q. B. 39, 42 ; *Molony v. Gibbons*, 1810, 2 Camp. 502.

(c) by having expressly or implicitly contracted¹ to submit to the jurisdiction of such Courts.

Comment and Illustrations.

General Observations.

First. The authority of the English Courts to entertain proceedings *in personam* against a defendant has, until quite modern times, been based in substance solely on the presence in England of the defendant at the commencement of the proceedings.² No question, therefore, has until recently arisen as to how far the jurisdiction *in personam* of our tribunals might or might not be affected by circumstances other than the defendant's presence in England, as, for example, by his ~~place of residence or domicile~~, by his nationality or allegiance, by ~~the place where a cause of action arose, or by the defendant's possession of property in England~~. These matters being irrelevant as regarded the jurisdiction exercisable by English judges, our Courts have never till recently been called upon to form for their own use a general theory as to jurisdiction. Hence, when they have been compelled to consider the effect which ought to be given to foreign judgments, they have shown an inclination to elude the necessity for formulating any general doctrine as to the principles which ought to regulate the exercise of jurisdiction by foreign Courts,³ and have, where it was

¹ *Copin v. Adamson*, 1875, 1 Ex. D. (C. A.) 17; *Vallée v. Dumergue*, 1849, 4 Ex. 290; 18 L. J. (Ex.) 398; *Bank of Australasia v. Harding*, 1850, 9 C. B. 661; 19 L. J. (C. P.) 345; *Bank of Australasia v. Nias*, 1851, 16 Q. B. 717; *Meeus v. Thullusson*, 1853, 8 Ex. 638; 22 L. J. (Ex.) 239; *Kelsall v. Marshall*, 1856, 1 C. B. n. s. 241; 26 L. J. C. P. 19.

² The jurisdiction of the Superior Courts of Common Law and of Equity depended substantially upon the King's writ being served upon the defendant. A writ could always be served on any defendant who was in England; and if some special cases be set aside in which the Court of Chancery allowed a writ of subpoena out of England, a writ could not be served on any defendant who was out of England. Hence the presence of a defendant in England was in effect the basis of the jurisdiction exercisable by our Courts. See, as to Chancery procedure generally, 1 *Spence*, 1st ed., p. 367, and, as to service of a writ of subpoena out of England, 2 *Spence*, p. 7, note (a), and General Orders of May 8, 1845, rule 32. It has only been of quite recent times that under statutory authority the service of a writ of summons out of England has been allowed, and the jurisdiction of the English Courts in actions *in personam* been extended to defendants who are out of England. See pp. 240-257, *ante*.

³ See *Westlake*, 3rd ed., 344; *Story*, ss. 610, 531, 537-540, 546-549.

possible, tried to determine each case more or less in reference to its special circumstances.

Secondly. In the vast majority of the reported cases which have reference to the jurisdiction of foreign Courts, the matter calling for determination has been how far a judgment given against a defendant in proceedings abroad can be enforced against him in England by means of an action. The question, therefore, raised, in so far as it really referred to the competence of the foreign tribunal, has been whether it was or was not the "duty"¹ of the defendant to obey the judgment of the foreign Court, or (what is the same thing) the command of the sovereign under whose authority the Court acted; and the answer to this inquiry has been judicially given in the form of a more or less complete enumeration of the cases in which a party to an action abroad is bound to obey the judgment of the foreign Court, or the commands of the foreign sovereign. It will be observed that the judgments or judicial dicta on this subject which are here cited mainly refer to the case of a defendant; but in principle they are clearly applicable to any person against whom a Court pronounces judgment in an action *in personam*. There is, however, little need to particularise the various circumstances, such, for example, as residence or allegiance, which might conceivably make it the duty of a plaintiff to obey the judgment of the foreign Court; for by the mere bringing of the action he has submitted himself to the jurisdiction of the Court, and in fairness to the defendant, if for no other reason, is bound to submit to the judgment of the tribunal to which he has himself appealed.

If the attitude of English judges with regard to questions of jurisdiction be borne in mind, the principles, which in their view ought, as regards actions *in personam*, to determine whether the Courts of a foreign Country are in a given case Courts of competent jurisdiction, may be gathered from the following statements taken from well-known judgments.

"The true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B., in "*Russell v. Smyth*,² and again repeated by him in "*Williams v. Jones*,³ that the judgment of a Court of competent jurisdiction "over the defendant imposes a duty or obligation on the defendant "to pay the sum for which judgment is given, which the Courts "in this country are bound to enforce; and consequently that any-

¹ See Intro., p. 48, *ante*.

² 9 M. & W. at p. 819.

³ 13 M. & W. at p. 633.

"thing which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action."¹

"We think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. . . .² But [each of these] suppositions is negatived in the present case.

"Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him."³

This doctrine is slightly expanded in a later judgment delivered by Fry, L. J.

"Then arises the question how far the defendant is bound by [the foreign judgment], and the law upon this point, I think, I may conveniently take from the case of *Schibsby v. Westenholz*,⁴ which has been so much discussed in the course of the argument. In that case the Court considered the principles on which foreign judgments are enforced by Courts of this country, and they said:⁵ 'We think, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in *England* is that stated by Parke, B., in *Russell v. Smyth*,⁶ and again repeated by him in *Williams v. Jones*,⁷ that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts in this country are bound to enforce; and consequently that anything which negatives that

¹ *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155, 159.

² The words omitted contain the suggestion that the presence of the defendant in a foreign country at the time when the obligation in respect of which the action is brought was there contracted may give the Courts thereof jurisdiction. But see *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670, and Rule 81, *post*.

³ *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155, 161, per *Blackburn, J.*; *Turnbull v. Walker*, 1892, 5 R. 132.

⁴ L. R. 6 Q. B. 155.

⁵ *Ibid.*, 159.

⁶ 9 M. & W. 810, 819.

⁷ 13 M. & W. 628, 633.

"duty, or forms a legal excuse for not performing it, is a defence to the action.' What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign Court? Having regard to that case, and to *Copin v. Adamson*,¹ they may, I think, be stated thus. The Courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the forum in which the judgment was obtained, and possibly, if *Becquet v. MacCarthy*² be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction."³

Particular Cases.

The circumstances under which, according to the judgments in *Schibsby v. Westenholz*,⁴ and *Rousillon v. Rousillon*,⁵ taken together with the judgment of the Privy Council in *Sirdar Gurdyal Singh v. Rajah of Faridkote*,⁶ a person is bound to obey the judgment of a foreign Court, correspond with, or are in fact restated in, the three Cases in which, under Rule 80, the Courts of a foreign country have jurisdiction.

These three Cases are applications of two principles explained and discussed in the introduction to this work.⁷ Cases 1 and 2 are clearly covered by the "principle of effectiveness." Case 3 is with equal clearness covered by the "principle of submission."

The list given in this Rule of the cases in which foreign Courts are, or may be, Courts of competent jurisdiction is not necessarily exhaustive. The law on the authority to be ascribed to the decisions of foreign tribunals is still uncertain, and still liable to undergo further development by means of judicial legislation. It is impossible, therefore, to assert with confidence that the jurisdic-

¹ L. R. 9 Ex. 345.

² 2 B. & Ad. 951. But whether this case has reference to the possession of real property by the defendant as a ground of jurisdiction?

³ *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351, 370, 371, per Fry, J.

⁴ 1870, L. R. 6 Q. B. 155. See pp. 371, 372, *ante*.

⁵ 1880, 14 Ch. D. 351.

⁶ [1894] A. C. 670.

⁷ Viz.: General Principle No. III., Intro., p. 38, *ante*, and General Principle No. IV., Intro., p. 42, *ante*.

tion of foreign Courts is in the opinion of English judges absolutely confined to the Cases enumerated in Rule 80.

Case 1. Residence.—The *residence*¹ of a defendant in a country at the time when an action is commenced against him is an admitted ground of jurisdiction. "If the defendants had been," it is said by the Court in *Schibbsby v. Westenholz*, "at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them."²

As the *presence* of a defendant in England at the time of the service of the writ was the sole foundation of the jurisdiction of the English Courts, they could hardly decline to hold that the *residence* of a defendant in a foreign country gave jurisdiction to the Courts thereof.

Two questions may, however, be raised on this point.

First Question.—Is *residence*, in the strict sense of the term, necessary, or will the mere presence of the defendant in the foreign country, *e. g.*, France, be enough to give the French Courts jurisdiction? The answer (probably) is that his presence is enough, or in other words, that residence means for the present purpose nothing more than such presence of the defendant as makes it possible to serve him with a writ, or other process by which the action is commenced.³

Second Question.—Is the *domicil* of the defendant, as contrasted with and in the absence of residence, sufficient to give a foreign Court jurisdiction? This question must (it is submitted) be answered in the negative.⁴

1. *X* is an Englishman living in France at the time when an action is commenced there against him. The French Courts have jurisdiction over *X*.⁵

2. *X* is an English traveller, staying at a hotel in Massachusetts. He is there served with a writ, requiring him to appear as

¹ See Rule 80, Case 1, p. 369, *ante*.

² *Schibbsby v. Westenholz*, 1870, L. R. 6 Q. B. 155, 161, *per Curiam*. See *Piggott*, pp. 130, 131.

³ *Carrick v. Hancock*, 1895, 12 Times L. R. 59.

⁴ See, however, the contrary opinion maintained by *Nelson*, p. 361, and note that English Courts do now, though this is a novelty, claim for themselves in some instances jurisdiction over a defendant in an action *in personam* simply on the ground of his domicil or ordinary residence in England. See *Intro.*, pp. 40-42, 46, 49-52, *ante*, and R. S. C. Ord. XI. r. 1 (g).

⁵ *Schibbsby v. Westenholz*, 1870, L. R. 6 Q. B. 155. As to how far want of notice may be an answer to an action on a judgment, see Rule 92, *post*.

defendant in an action brought against him in a Massachusetts Court. Semble, the Massachusetts Court has jurisdiction.¹

3. *X* is a British subject residing in England, but domiciled in France. An action is brought against him in Paris. He is served with process or notice of process in England. Semble, the French Court has no jurisdiction.

Case 2. Allegiance. — “The Courts of this country consider “the defendant bound where he is a *subject*² of the foreign country in which the judgment [against him] has been obtained.”³ Allegiance, that is to say, is, independent of residence, a ground of jurisdiction. The reason of this is that a subject is bound to obey the commands of his sovereign, and, therefore, the judgments of his sovereign’s Courts. The allegiance must, it would seem, exist at the time not when the action is commenced, but when the judgment is given.⁴ And a nice question of jurisdiction might arise, supposing a defendant to have changed his allegiance after the commencement of an action against him.

The doctrine, however, that allegiance is sufficient to give jurisdiction, though supported by judicial dicta, cannot be established by any reported decision. In *Douglas v. Forrest*,⁵ which goes near to a decision on this point, the Court dwell on the fact of the defendant having at the time of the judgment possessed property in Scotland.

1. *X* is a French citizen residing and domiciled in England. An action is brought against *X* in France. *X*, whilst residing in England, has actual notice of the action. Judgment is, in his absence, pronounced against *X* in France. The French Court (semble) has jurisdiction.⁶

2. *X* is a French citizen residing and domiciled in England. An action is brought against *X* in France, and judgment is pronounced against *X* in the French Court. *X* has not been served with any process, and has not any actual notice of the action, but steps are taken in France which under French law are equivalent

¹ See *Carrick v. Hancock*, 1895, 12 Times L. R. 59.

² See Rule 80, Case 2, p. 369, *ante*.

³ *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351, 371, judgment of *Fry, J.* See *Douglas v. Forrest*, 1828, 4 Bing. 686.

⁴ Compare *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155, 161; *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351, 371; *Meek v. Wendt*, 1888, 21 Q. B. D. 126, 130.

⁵ 1828, 4 Bing. 686.

⁶ Compare *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155, 161, and *Copin v. Adamson*, 1875, 1 Ex. D. (C. A.) 17; 1874, L. R. 9 Ex. 345.

to service of process. The French Court has (semble) jurisdiction.¹

Case 3. Submission.— This Case rests on the simple and universally admitted principle that a litigant who has *voluntarily submitted*² himself to the jurisdiction of a Court cannot afterwards dispute its jurisdiction.³ The submission may take place in different ways, and may be made either by the party who is plaintiff or by the party who is defendant before the foreign Court.

(a) *Plaintiff.*— “ We think it clear, upon principle, that if “ a person selected, as plaintiff, the tribunal of a foreign country “ as the one in which he would sue, he could not afterwards say “ that the judgment of that tribunal was not binding upon him.”⁴

(b) *Defendant.*— A person who voluntarily appears as defendant in an action takes his chances of success, and submits himself to the judgment of the Court, so that he cannot afterwards dispute its jurisdiction.⁵

A defendant who appears only to protest against the jurisdiction of a Court manifestly does not submit himself to it.⁶ When he does appear without protest, he certainly does *primâ facie* submit himself to the Court's jurisdiction.

A question, however, may even then arise whether the appearance is voluntary, and in this matter the following distinction must be noted : —

If a defendant appears merely to protect his property from the risk of seizure, the appearance is “ voluntary,”⁷ and the defendant submits to the Court's jurisdiction ; to hold otherwise would render the effect of appearance nugatory, for in any action a defendant who has or may have property in the country where the action is brought, has reason to fear that the result of the action, if adverse, will be the seizure of his property by execution or otherwise. If, on the other hand, the defendant appears merely to protect property which has *already been seized* by the foreign Court, the appearance is not voluntary, and does not confer jurisdiction upon the Court.⁸

¹ See *Douglas v. Forrest*, 1828, 4 Bing. 686 ; *Copin v. Adamson*, 1875, 1 Ex. D. (C. A.) 17 ; and contrast *Buchanan v. Rucker*, 1808, 1 Camp. 63.

² See Rule 80, Case 3, p. 369, *ante*.

³ See Intro., p. 42, *ante*.

⁴ *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155, 161. See *Westlake*, 3rd ed., pp. 347, 348.

⁵ See *Voinet v. Barrett*, 1885, 55 L. J. Q. B. (C. A.) 39.

⁶ *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149.

⁷ *Voinet v. Barrett*, 1885, 55 L. J. Q. B. (C. A.) 39.

⁸ *Ibid.*, p. 41, judgment of *Esher*, M. R.

(c) *Contract to submit.* — The parties to a contract may make it one of the express¹ or implied² terms of the contract that they will submit in respect of any alleged breach thereof, or any matter having relation thereto, to the jurisdiction of a foreign Court, and a person who has thus contracted is clearly bound by his own submission.³ All that need be further noted is, that under this head may be brought cases in which, from the nature of the contract (*e. g.*, possibly an agreement with regard to foreign land⁴), it may be presumed that the parties intended to submit to the jurisdiction of particular Courts, *viz.*, the Courts of the country where the land is situate.

1. *A*, an Englishman residing in England, brings an action against *X* in France for the breach of a contract made and broken in England. The French Court gives judgment in *X*'s favour. The French Court has jurisdiction over *A*.⁵

2. *A* brings an action in a French Court against *X*, an Englishman domiciled in England. Notice is served upon *X* in England. *X* appears in France and defends the action. There has been no property of *X*'s at any time in the hands of the Court, but *X* is from his business transactions often in a position in which a judgment of the French Court could be executed against him. The French Court has jurisdiction over *X* on account of his voluntary appearance.⁶

3. *X* is an Englishman resident and domiciled in England. An action is brought against him in France on a contract made, and alleged to have been broken, by him in England. *X* has

¹ *Copin v. Adamson*, 1875, 1 Ex. D. (C. A.) 17; *Law v. Garrett*, 1878, 8 Ch. D. (C. A.) 26.

² *Bank of Australasia v. Harding*, 1850, 9 C. B. 661; 19 L. J. C. P. 345; *Bank of Australasia v. Nias*, 1851, 20 L. J. Q. B. 284; 16 Q. B. 717; *Vallée v. Dumergue*, 1849, 4 Ex. 290; 18 L. J. Ex. 398.

³ *Nelson*, p. 363. See *Law v. Garrett*, 1878, 8 Ch. D. (C. A.) 26.

⁴ But compare *Agnew v. Usher*, 1884, 14 Q. B. D. 78, and *British Wagon Co. v. Gray*, [1896] 1 Q. B. (C. A.) 35, decided with reference to Ord. XI. r. 1 (e).

⁵ See *Schibsey v. Westenholz*, 1870, L. R. 6 Q. B. 155, 161; *Novelli v. Rossi*, 1831, 2 B. & Ad. 757.

The question as to jurisdiction might arise as against the plaintiff in the foreign action in one of, at least, two ways, *viz.*, (1) on the plea of *res judicata*, if the plaintiff should sue for the same cause of action in England; and (2) on a plea of the party who was plaintiff abroad, if he should be sued on the judgment as defendant in England, *e. g.*, for costs.

⁶ *Voinet v. Barrett*, 1885, 55 L. J. Q. B. (C. A.) 39. See *Duflos v. Burlingham*, 1880, 34 L. T. 688; *De Cosse Brissac v. Rathbone*, 1861, 6 H. & N. 301; 30 L. J. (Ex.) 238; *Malony v. Gibbons*, 1810, 2 Camp. 502.

property in France, which is seized by the Court. *X*, after the seizure of the property, appears and defends the action with a view to saving his property. *Semble*, *X*'s appearance to the action does not give the French Court jurisdiction.¹

4. *X*, an Englishman, enters into a contract with *A* to trade in co-partnership in Russia. *X* resides in England. It is a term of the contract that all disputes, no matter how or where they arise, shall be referred to a Russian Court. Disputes arise concerning the terms of the partnership. *A* brings an action against *X*, in a Russian Court, for alleged breach of the contract. The Russian Court has jurisdiction.²

5. *X* is an Englishman, resident and domiciled in England, and not a native or citizen of France. He holds shares in a French company. *X* thereby becomes, under the law of France, subject to all the conditions contained in the statutes of the company. Under these statutes every shareholder is compelled to elect a domicile in France, and, as to all disputes which may arise during the liquidation of the company, is subject to a French tribunal. The company goes into liquidation, and *A* brings an action in France against *X* for the amount not paid up on *X*'s shares. Notice is duly served on *X*, at his elected domicile, though *X* has no knowledge of the statutes of the company or their provisions. *A* recovers judgment against *X*. The French Court has jurisdiction.³

6. *X*, an Englishman residing in England, is a member of an Australian company. A colonial Act enables the chairman of the company to sue and be sued for the company, and provides that he is to be taken as agent for the members of the company. An action is brought, and judgment recovered, in Australia, against the chairman by *A*; *i. e.*, in effect, an action is brought, and judgment recovered, against *X*; he has no notice of the proceedings against the chairman. The Australian Court has jurisdiction against *X*.⁴

¹ See *Voinet v. Barrett*, 1885, 55 L. J. Q. B. 39, 41, judgment of *Esher*, M. R., and p. 42, judgment of *Bowen*, L. J. But see *Piggott*, p. 161.

² See *Law v. Garrett*, 1878, 8 Ch. D. (C. A.) 26. This case does not directly raise the question of jurisdiction, but implies that the agreement gave jurisdiction to the Russian Court.

³ *Copin v. Adamson*, 1875, 1 Ex. D. (C. A.) 17. Compare the fuller report of the proceedings in the Court below, 1874, L. R. 9 Ex. 345. See also, *Vallée v. Dumergue*, 1849, 4 Ex. 290; 18 L. J. Ex. 398.

⁴ *Bank of Australasia v. Harding*, 1850, 9 C. B. 661; 19 L. J. C. P. 345. See, also, *Bank of Australasia v. Nias*, 1851, 16 Q. B. 717; 20 L. J. (Q. B.) 284. The result is that an action can be maintained in England against *X*, on the Australian judgment, given nominally against the chairman. See *Effect of Foreign Judgments*, chap. xvi.

7. *X*. an Englishman resident and domiciled in England, is the tenant of land in France. *X* is sued in a French Court by his landlord, *A*, for rent due from *X*. Constructive notice is given to *X* in accordance with the provisions of French law, but he has no other notice of the proceedings and does not appear to defend the action. Whether the French Court may possibly have jurisdiction? ¹

RULE 81.²—In an action *in personam* the Courts of a foreign country probably do not acquire jurisdiction either —

- (1) from the mere possession by the defendant at the commencement of the action of property locally situate in that country, or
- (2) from the presence of the defendant in such country at the time when the obligation in respect of which the action is brought was incurred in that country.

Comment and Illustrations.

Clause 1. “Whilst we think,” it is laid down by the Court of Queen’s Bench, “that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in *Douglas v. Forrest*,³ we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground. It should rather seem that, whilst every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment. But it is unnecessary to decide this, as the defendants had in this case no property in France.” ⁴

This statement, though not quite decisive, appears to negative

¹ See p. 373, *ante*.

² As to clause 1, see *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155; as to clause 2, *Sirdar Gurdayal Singh v. Rajah of Faridkote*, [1894] A. C. 670, 685, 686, judgment of P. C., with which contrast *Becquet v. MacCarthy*, 1831, 2 B. & Ad. 951, and judgment in *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 161.

³ 4 Bing. 703, and Rule 80, p. 369, *ante*.

⁴ *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155, 163, *per Curiam*. See also, *Voinet v. Barrett*, 1885, 55 L. J. Q. B. 39.

the claim made by the Courts of some foreign countries, and especially of Scotland,¹ to ground jurisdiction in an action *in personam* on the mere fact of the possession by the defendant of property lying within the limits of the country to which the Courts belong.²

1. *X* is domiciled and resident in England. He possesses goods in a house in Edinburgh. *A* brings an action against *X* in the Court of Session for breach of contract in England. *X*'s goods in Edinburgh are arrested to found jurisdiction (*ad fundandam jurisdictionem*). The Court has no jurisdiction.³

2. *A* is a fruit merchant at Edinburgh. He brings an action in the Court of Session against the L. & N. W. Ry. Co. for damage to fruit of *A*'s, arising from the negligence of the defendants in the carriage thereof. The act of negligence takes place in England, *A* arrests movable property of the defendant's in Scotland. The Court has no jurisdiction.⁴

3. *A*, an Englishman, resident in London, has a claim against *X & Co.*, an English company resident in London, in respect of a life policy granted to *N*. *X & Co.* have money in a bank in Scotland. *A* arrests the money due by the bank to *X & Co.*, and brings an action in the Court of Session against *X & Co.* on the policy. The Court has no jurisdiction.⁵

Clause 2. A dictum of Blackburn, J., has suggested that under the circumstances stated in clause 2, the judgment of a foreign Court would bind the defendant, *i. e.*, the Court would be a Court of competent jurisdiction.

¹ See *Piggott*, pp. 239, 240; *L. & N. W. Ry. Co. v. Lindsay*, 1858, 3 Macq. 99; *Douglas v. Jones*, 1831, 9 Sh. & D. 856; 1 *Mackay, Prac. of Court of Session*, pp. 171-177.

² See, however, p. 377, *ante*, as to the possibility of a contract with reference to land in a foreign country implying submission to the jurisdiction of the Courts of such country.

³ *I. e.*, the Scotch Court is not a "Court of competent jurisdiction" in the opinion of English judges. *L. & N. W. Ry. Co. v. Lindsay*, 1858, 3 Macq. 99. See as to the ambiguity of the expression "Court of competent jurisdiction," pp. 361-363, *ante*.

⁴ See *L. & N. W. Ry. Co. v. Lindsay*, 1858, 3 Macq. 99. The Court has jurisdiction according to Scotch law.

⁵ See for the facts, *Parken v. Royal Exchange Co.* (8 Sec. ser. 365), cited 3 Macq. 109. In this case the Court of Session had jurisdiction according to Scotch law but, *semble*, was not a "Court of competent jurisdiction" in the sense in which the words are here used, *i. e.*, according to English law. Some doubt exists whether, even according to Scotch law, jurisdiction arising from arrestment goes beyond the right to deal with the property arrested. See *L. & N. W. Ry. Co. v. Lindsay*, 1858, 3 Macq. 106, 107, opinion of *Cranworth*, L. C., and *Mackay, Manual of Practice*, p. 59.

The Privy Council, however, have distinctly held that these circumstances are not sufficient to give jurisdiction, and have thus stated and commented upon Blackburn's doctrine:—

“The words of Blackburn, J.'s judgment, in *Schibsby v. Westenholz*,¹ . . . are these:—

“If, at the time when the obligation was contracted, the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them; though, before finally deciding this, we should like to hear the question argued.’

“Upon this sentence it is to be observed, that beyond doubt in such a case the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever forum the remedy might be sought. The learned judge had not to consider whether it was a legitimate consequence from this, that they would be bound to submit, on the footing of contract or otherwise, to any assumption of jurisdiction over them in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad. That question was not argued, and did not arise, in the case then before the Court; and, if this was what Blackburn, J., meant, their Lordships could not regard any mere inclination of opinion, on a question of such large and general importance, on which the judges themselves would have desired to hear argument if it had required decision, as entitled to the same weight which might be due to a considered judgment of the same authority. Upon the question itself, which was determined in *Schibsby v. Westenholz*,² Blackburn, J., had at the trial formed a different opinion from that at which he ultimately arrived; and their Lordships do not doubt that, if he had heard argument upon the question, whether an obligation to accept the *forum loci contractûs*, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation, unless expressed, could not be implied.”³

It may, therefore, be concluded, at any rate with great proba-

¹ L. R. 6 Q. B. 161.

² *Ibid.*

³ *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670, 685, 686, judgment of P. C.

bility, that, as stated in clause 2, the mere presence of a defendant in a country at a time when an obligation is incurred does not of itself give the Courts jurisdiction over him in respect of such obligation.

1. *X*, a British subject domiciled in England, holds an official position and resides in Italy. *X*, whilst residing there, is guilty of a fraud, but, before proceedings are commenced against him in respect thereof, returns to and takes up his permanent residence in England. An action, of which he has notice in England, is brought against him in respect of the fraud in an Italian Court, and judgment for £1,000 is recovered. The Italian Court has no jurisdiction.¹

2. *X*, a Swiss subject, when in Paris, enters into a contract with *A* that he will not carry on a certain trade in England or elsewhere. When *X* is residing in England he carries on the trade there in breach of his contract. *A* brings an action against *X* in a French Court. The French Court has no jurisdiction.²

¹ Suggested by *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670.

² *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351, 371.

AMERICAN NOTES.

CHAPTER XII.

JURISDICTION IN ACTIONS *IN PERSONAM*.

SEE, generally, as to jurisdiction in actions *in personam*, American Notes under chaps. iv., v., xiv., and xvi. A judgment *in personam*, for the recovery of a debt or demand, is generally regarded as invalid for want of jurisdiction, unless the defendant either voluntarily appeared, or he, or some one authorised by him, was personally cited to appear. *Pennoyer v. Neff*, 95 U. S. 714 ; *Hart v. Sansom*, 110 U. S. 151 ; *Johnson v. Powers*, 139 U. S. 156 ; *Renier v. Hurlbut*, 81 Wis. 24 ; 50 N. W. 783. This rule applies to a personal judgment against a foreign corporation. *St. Clair v. Cox*, 106 U. S. 350. A person may, by invoking or submitting to the jurisdiction of a foreign Court, preclude himself from afterward denying its jurisdiction. *Matter of Waite*, 99 N. Y. 433, 439.

In *Shepard v. Wright*, 59 How. Pr. 512, it was said, *obiter*, that a personal judgment rendered in Canada against a resident of New York would not, though the defendant was a "citizen" of Canada, be enforced against him in New York unless he was served with process in Canada or voluntarily appeared in the action.

CHAPTER XIII.

JURISDICTION IN ACTIONS *IN REM*.¹

RULE 82.²—In an action or proceeding *in rem* the Courts of a foreign country have jurisdiction to determine the title to any immovable or movable within such country.

Comment.

The foundation of jurisdiction in an “action *in rem*” — using these words in their very widest sense — is the power to deal with or dispose of the property, the title to which, or the possession whereof, is in question. If the sovereign of a country has in fact the power to transfer the ownership or possession of property, the judgment of his Courts in regard to such property is decisive in regard to the right to such property.³

“If the matter in controversy is land,” writes Story, “or other immovable property, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation, as to all the matters of right and title which it professes to decide in relation thereto. This results from the very nature of the case; for no other Court can have a competent jurisdiction to inquire into or settle such right or title. By the general consent of nations, therefore, in cases of immovables, the judgment of the *forum rei sitæ* is held absolutely conclusive.”⁴

“The same principle,” writes Story, “is applied to all . . . cases of proceedings *in rem*, against movable property, within the jurisdiction of the Court pronouncing the judgment. Whatever the Court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer,

¹ As to the distinction between an action *in personam* and an action *in rem*, see *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414, 429, opinion of *Blackburn, J.*; *Meyer v. Ralli*, 1876, 1 C. P. D. 358; *The City of Mecca*, 1879, 5 P. D. 28, 1881, 6 P. D. (C. A.) 106; *In re Truport*, 1887, 36 Ch. D. 600.

² See *Story*, s. 592.

³ See *Intro.*, General Principle No. III., p. 38, *ante*.

⁴ *Story*, s. 591.

“or other act, will be held valid in every other country, where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign courts of admiralty, whether they are causes of prize, or of bottomry, or of salvage, or of forfeiture [or of damage by collision], or of any the like nature, over which such Courts have a rightful jurisdiction, founded on the actual or constructive possession of the subject-matter (*res*).”¹

These words are an authoritative statement of the principle accepted by English judges that the Courts of a country are Courts of competent jurisdiction² with regard to the title to, or possession of, movable not less than immovable property which is situate in that country, or, it may be added, which is at the moment under the actual and lawful control of the sovereign whom such Courts represent.

Our Rule, it should be noted, is of wide application. It applies not only to proceedings which are in strictness actions *in rem*, but also to proceedings such as the administration of a deceased person's property³ which, though not strictly actions *in rem*, determine the title to property.

Illustrations.

1. Goods belonging to *A*, an Englishman, are on board a Prussian ship which is wrecked in Norway. The goods are sold in Norway, as *A* alleges, wrongfully. *A* takes proceedings in a Norwegian Court to set aside the sale. The Norwegian Court has jurisdiction to determine the title to the goods.⁴

2. The right to the possession of English bills, drawn and accepted in England by English firms, is raised before a Norwegian Court whilst the bills are in Norway, in the hands of *N*, the agent of *X*, to whom the bills have been indorsed in England.

¹ *Story*, s. 592, cited with approval in *Castrique v. Imrie*, 1870, L.R. 4 H. L. 414, 428, 429, opinion of *Blackburn*, J.

² But as to movable property not of exclusively competent jurisdiction. Compare as to the principle of effectiveness, Intro., p. 38, *ante*, and as to the law governing the assignment of a movable, Rule 140, *post*. And see *Cammell v. Sewell*, 1860, 5 H. & N. 728, 744, 745, judgment of *Crompton*, J.; *In re Queensland Mercantile &c. Co.* [1891] 1 Ch. 536, 545; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

³ See chap. xv., Rule 86, p. 398, *post*.

⁴ See *Cammell v. Sewell*, 1860, 5 H. & N. 728; 29 L. J. Ex. 350 (Ex. Ch.).

The Norwegian Court has jurisdiction to determine the right to the possession of the bills.¹

3. *N* dies domiciled in England leaving land and money in New York. The Courts of New York have jurisdiction to administer and to determine the right to succeed to *N*'s land and money in New York.²

¹ *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

² Compare *Enohin v. Wylie*, 1862, 10 H. L. C. 1, 19, language of Lord Cranworth, and p. 23, language of Lord Chelmsford. See chap. xv., Rule 86, p. 398, *post*.

CHAPTER XIV.

JURISDICTION IN MATTERS OF DIVORCE AND AS REGARDS VALIDITY OF MARRIAGE.

I. DIVORCE.

(A) WHERE COURTS HAVE JURISDICTION.

RULE 83.—Subject to the possible exception hereinafter mentioned, the Courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of the proceedings for divorce.¹

This Rule applies to

- (1) an English marriage ;²
- (2) a foreign marriage.

Comment and Illustrations.

This Rule, in effect, states that the Courts of a foreign country where the parties to a marriage are domiciled at the time of proceedings for divorce have jurisdiction, in the opinion of English judges, to dissolve the marriage, and that the jurisdiction of the Courts is not affected by the law of the country where the marriage is celebrated, or by the law of the domicile of the parties at the time of the marriage.

This statement of the law is, it is conceived, a just inference from the authorities to be found on the subject. But the question whether the principle thus broadly laid down can be maintained to its full extent is, it must be admitted, open to doubt,³ and somewhat different considerations apply to English and to foreign marriages respectively.

¹ *Shaw v. Gould*, 1868, L. R. 3 H. L. 55 ; *Dolphin v. Robins*, 1859, 7 H. L. C. 390 ; 29 L. J. P. & M. 11 ; *Pitt v. Pitt*, 1864, 4 Macq. 627.

² *Harvey v. Farnie*, 1880, 5 P. D. 153 ; 6 P. D. (C. A.) 35 ; 1882, 8 App. Cas. 43, 50, 51, 63, 64 ; and compare *Briggs v. Briggs*, 1880, 5 P. D. 163.

³ App., Note 9, *Effect of Foreign Divorce on English Marriage*.

(1) *English Marriages*. — An English marriage means a marriage which, wherever celebrated, is made between parties of whom the husband is at the time thereof domiciled in England.¹ At one period, no doubt, every marriage celebrated in England was held an English marriage,² though it was never apparently thought that every marriage celebrated abroad was a foreign marriage, and, on the whole, the definition of the term which makes the character of the marriage depend on the domicile of the husband appears to be correct, and, in the main, to conform to modern usage.³

Weighty judicial dicta support the doctrine as to English marriages stated in the Rule.

"It is the strong inclination of my own opinion," says Lord Penzance, "that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled."⁴

"In no case," says the same judge in another judgment, "has a foreign divorce been held to invalidate an English marriage between English subjects where the parties were not domiciled in the country by whose tribunals the divorce was granted. Whether, if so domiciled, the English Courts would recognise and act upon such a divorce, appears to be a question not wholly free from doubt; but the better opinion seems to be that they would do so if the divorce be for a ground of divorce recognised as such in this country, and the foreign country be not resorted to for the collusive purpose of calling in the aid of its tribunals. To my mind it is manifestly just and expedient that those who may have permanently taken up their abode in a foreign country, resigning their English domicile, should, in contemplation

¹ See *Warrender v. Warrender*, 1835, 2 Cl. & F. 488; *Geils v. Geils*, 1851, 3 H. L. C. 280.

² See *McCarthy v. De Caix*, 2 Cl. & F. 568 (n).

³ See, however, remarks of Lord Westbury in *Shaw v. Gould*, 1868, L. R. 3 H. L. 55, criticising the statements of Lord Brougham in *Warrender v. Warrender*, 1835, 2 Cl. & F. 488. The different meanings given to the term "English marriage" are connected with the different senses affixed at different times to the expression *lex loci contractus*. As long as that term was taken to mean the law of the country where a contract is made, the expression English marriage naturally meant marriage celebrated in England. When the term is understood to mean the law of the country with reference to which a contract is made, English marriage is naturally taken to mean a marriage made with reference to the law of an English domicile.

⁴ *Wilson v. Wilson*, 1872, L. R. 2 P. & D. 435, 442. See judgment of Brett, L. J., in *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1, 19.

"of English law, be permitted to resort with effect to the tribunals exercising jurisdiction over the community, of which, by their change of domicile, they have become a part, rather than they should be forced back for relief upon the tribunals of the country they have abandoned." ¹

"The position," says Lord Westbury, "that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects is competent to pronounce a similar decree between English subjects who were married in England, but who, before and at the time of the suit, are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bonâ fide* suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly cited as the resolution of the judges in *Lolley's Case*." ²

The force of these dicta is increased by the consideration that the High Court assumes, in its own practice, the sufficiency of domicile to give jurisdiction in matters of divorce, and that the Divorce Act invalidates all arguments based on the indissolubility of an English marriage, and being applicable to marriages celebrated before the passing of the Act, may be taken as a legislative declaration that the right to divorce does not depend on the terms of the marriage contract. ³

No decision further is reported which determines that under the present state of the English divorce law a foreign divorce cannot dissolve an English marriage, ⁴ and, though no case absolutely decides ⁵ that an English marriage can be dissolved by a foreign divorce, the preponderance both of authority and of principle is strongly in favour of the validity of such divorce when the parties are domiciled in the country where it is granted.

H and *W*, persons domiciled in England, are married in Lon-

¹ *Shaw v. Attorney-General*, 1870, L. R. 2 P. & D. 156, 161, 162, per Lord Penzance.

² *Shaw v. Gould*, 1868, L. R. 3 H. L. 55, 85, judgment of Lord Westbury.

³ Compare *Scott v. Attorney-General*, 1886, 11 P. D. 128, and see App., Note 8, *Theories of Divorce*.

⁴ *McCarthy v. De Caiz*, 1831, 2 Cl. & F. 568 (n), is, even if rightly decided, not an authority applicable to the state of the law existing since the Divorce Act of 1857. Nor does *Lolley's Case*, 1812, 2 Cl. & F. 567 (n), necessarily decide more than that the foreign Court of a country where the parties to an English marriage were not domiciled had no jurisdiction to dissolve their marriage. App., Note 9, *Effect of Foreign Divorce on English Marriage*.

⁵ See *Harvey v. Farnie*, 1882, 8 App. Cas. 43, and especially, pp. 58-61, language of Lord Blackburn.

don. After the marriage they acquire a domicile in Scotland. *W* commits adultery in Scotland, and *H*, still being domiciled in Scotland, is divorced from *W* by the Court of Session. The divorce is all but certainly valid in England, *i. e.*, the Scotch Court is all but certainly a Court of competent jurisdiction.

(2) *Foreign Marriages*.—A foreign marriage means any marriage which does not fall within the definition already given of an English marriage.¹ Hence the marriage in England of persons domiciled at the time of the marriage, *e. g.*, in Sweden, is a foreign marriage.

The jurisdiction of the Courts of a foreign country, *e. g.*, Sweden, where the parties to a marriage are domiciled to dissolve a foreign marriage, may call for decision by English tribunals under various different circumstances.

First. The parties may at the time of the divorce be citizens of the country where the divorce is granted. In this case the English Courts will undoubtedly hold that the Swedish Courts are Courts of competent jurisdiction, or that the divorce is *primâ facie* valid. Nor would it make any difference if the parties, though domiciled in Sweden at the time of their marriage, were married out of Sweden, *e. g.*, in France. If, however, they were at the time of the marriage domiciled out of Sweden, *e. g.*, in Italy, the jurisdiction of the Swedish Courts to grant a divorce, and therefore the validity in England of the divorce, might be open to question; but the Swedish Courts would probably, even in this case, be held to be Courts of competent jurisdiction.²

Secondly. The parties may, at the time of the divorce, not be citizens of the country (Sweden) where the divorce is granted. Even in this case our Courts would probably adhere to the principle that jurisdiction depends upon domicile, and would, therefore, hold that a Swedish Divorce Court has jurisdiction to dissolve the marriage of, for instance, French citizens domiciled at Stockholm.

It must, however, be admitted that where citizenship and domicile differ, cases of considerable difficulty may arise, especially in dealing with the position of citizens of countries which, like Italy, make personal capacity depend not upon domicile, but upon alle-

¹ See p. 388, *ante*. If an English marriage be so defined as to include all marriages celebrated in England, the definition of a foreign marriage must be so varied as to meet this definition of the term English marriage. *Warrender v. Warrender*, 1835, 2 Cl. & F. 488; *Geils v. Geils*, 1851, 3 H. L. C. 280.

² Conf. *Connolly v. Connolly*, 1851, 7 Moore P. C. 438.

giance, and, further, do not recognise divorce as regards their own citizens.¹ *H* and *W*, Italian subjects, marry in Italy whilst there domiciled. They afterwards acquire a Swedish domicile, and whilst domiciled in Sweden, are divorced by a Swedish Court. They neither of them change their allegiance, but retain their Italian citizenship. *H*, after the divorce, and whilst still retaining his Swedish domicile, marries *N* in England during the lifetime of *W*. The divorce and second marriage are both invalid in Italy. Probably the English Courts would hold that the Swedish Courts had jurisdiction to grant a divorce, and, therefore, as a result that the second marriage is valid.

Exception. — The Courts of a foreign country, possibly, have no jurisdiction to dissolve an English marriage for any cause for which a divorce could not be obtained in England (??).

Comment.

This Exception is suggested by the language of some judges who apparently limit the jurisdiction of a foreign Court to dissolve an English marriage to cases in which the divorce is granted on grounds recognised as a cause of divorce in this country.² But this exception, it is certain, only applies to a marriage which is in strictness an English marriage, as hereinbefore defined,³ and has no application to a marriage celebrated in England when the husband is not domiciled in England.⁴

The validity, indeed, of the exception is open to the gravest doubt; it is not supported by a single reported case, and is a mere deduction from the principle which English Courts have now, on the whole, surrendered,⁵ that the right to a divorce depends on the terms of the marriage contract.⁶

¹ See *Fiore*, ss. 117–134.

² See *Shaw v. Attorney-General*, 1870, L. R. 2 P. & D. 156, 161, 162, judgment of Lord Penzance; *Niboyet v. Niboyet*, 1875, 4 P. D. (C. A.) 1, 8, judgment of James, L. J.

³ See p. 388, *ante*.

⁴ *Harvey v. Farnie*, 1882, 8 App. Cas. 43.

⁵ See App., Note 8, *Theories of Divorce*.

⁶ The supposed exception is almost inconsistent with *Scott v. Attorney-General*, 1886, 11 P. D. 128. In this case *H* and *W*, both Irish persons, domiciled in Ireland, are there married; they afterwards become domiciled at Cape Town, and whilst they are there domiciled, *H* obtains a divorce from *W* on the ground of adultery. The divorce is held valid in England, but under the law of Ireland divorce *a vinculo* cannot be obtained for adultery or for any other cause.

Illustration.

H and *W* are English persons, married in England and there domiciled at the time of their marriage. They afterwards obtain a Prussian domicile and are divorced at Berlin on the ground of mutual aversion. The Prussian Courts are, perhaps, not Courts of competent jurisdiction to dissolve the marriage of *H* and *W* for this cause, since mutual aversion is not a cause for which divorce could be obtained in England.

(B) WHERE COURTS HAVE NO JURISDICTION.

RULE 84. — Subject to the possible exception hereinafter mentioned, the Courts of a foreign country have no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of the proceedings for divorce.¹

Comment.

This Rule certainly holds good as to English marriages.²

"In no case has a foreign divorce been held to invalidate an English marriage between English subjects, where the parties were not domiciled in the country by whose tribunals the divorce was granted."³ The Scotch Courts have constantly claimed the right to dissolve English marriages where the parties have acquired no real domicile in Scotland, but have merely resided there a sufficient time to give the Scotch Courts jurisdiction, according to one view of Scotch law,⁴ and this claim has been consistently repudiated by English tribunals. In spite, therefore, of some doubts which have been expressed on the subject,⁵ it must be taken now as clearly established that the Scotch Courts have as regards, at

¹ *Pitt v. Pitt*, 1864, 4 Macq. 627; *Dolphin v. Robins*, 1859, 7 H. L. C. 390; *Shaw v. Gould*, 1868, L. R. 3 H. L. 55; *Shaw v. Attorney-General*, 1870, L. R. 2 P. & D. 156; *Sinclair v. Sinclair*, 1798, 1 Const. 294; *Tollemache v. Tollemache*, 1859, 1 Sw. & Tr. 557; *Green v. Green*, [1893] P. 89.

² *Green v. Green*, [1893] P. 89.

³ *Shaw v. Attorney-General*, 1870, L. R. 2 P. & D. 156, 161, 162, per Lord Penzance.

⁴ See, however, *Pitt v. Pitt*, 1864, 4 Macq. 627, which makes it doubtful whether even, according to the law of Scotland, the Scotch Courts have, under such circumstances, the right to pronounce a divorce.

⁵ See expressions of Lord Chelmsford in *Shaw v. Gould*, 1868, L. R. 3 H. L. 55, 77.

any rate, any effects in England, no power to dissolve an English marriage, where the parties are not really domiciled in Scotland; ¹ and, further, that the same doctrine applies to all foreign Courts.²

H and *W*, a man and woman domiciled in England, are married at Greenwich. *H*, the husband, afterwards resides, but does not obtain a domicile in Scotland. He then applies for and obtains a divorce from the Court of Session. The Court of Session has no jurisdiction to dissolve the marriage.³

It is probable that English tribunals will apply the same rule to a foreign divorce purporting to dissolve a foreign marriage, as to a foreign divorce purporting to dissolve an English marriage, and that, therefore, a foreign divorce is invalid in England in the case of a foreign marriage, if the parties to the marriage are, at the time of the divorce, not domiciled in the country where the Court granting the divorce exercises jurisdiction.

H and *W*, domiciled French subjects, are married in France. While still retaining their French domicile they are divorced in Belgium, where they are residing. The Belgian Courts have probably no jurisdiction.⁴

Exception. — The Courts of a foreign country, where the parties to a marriage are not domiciled, possibly, have jurisdiction to dissolve their marriage, if the divorce granted by such Courts would be held valid by the Courts of the country where the parties are domiciled.

Comment.

The theory maintained by Italian lawyers appears to be ⁵ that jurisdiction in matters of divorce depends not upon the domicile, but upon the nationality of the parties. The following case might therefore arise : —

H and *W*, Swedish subjects married in Sweden, are domiciled at Turin. While they are domiciled in Italy they obtain a divorce in Sweden. Italian Courts would apparently hold the divorce

¹ *Dolphin v. Robins*, 1859, 7 H. L. C. 390, 414, judgment of Lord Cranworth.

² *Lolley's Case*, 1812, 2 Cl. & F. 567; *McCarthy v. De Caix*, 1831, *Ibid.*, 568.

³ *I. e.*, is not, in the opinion of English judges, a Court of competent jurisdiction, and the divorce is consequently invalid in England. See *Shaw v. Gould*, 1868, L. R. 3 H. L. 55; *Dolphin v. Robins*, 1859, 7 H. L. C. 390; 29 L. J. (P. & M.) 11; *Tollemache v. Tollemache*, 1859, 1 Sw. & Tr. 557.

⁴ See *Sinclair v. Sinclair*, 1789, 1 Const. 294, and judgment of Sir *W. Scott*, p. 297. Nice questions may, however, be raised as to the effect in England of a foreign divorce granted in a country where the parties are not domiciled.

⁵ *Fiore*, ss. 131, 132.

valid. It may be conjectured that, under these circumstances, English judges would hold that the Swedish Courts had jurisdiction to dissolve the marriage of *H* and *W*, who in the case supposed would in effect be divorced by the Courts of their domicile.¹

II. VALIDITY OF MARRIAGE.

RULE 85.²—The Courts of a foreign country have (semble) jurisdiction to determine the validity of any marriage celebrated in such country (?).

Comment.

This Rule has no reference to divorce. It means that the Courts of a foreign country where a marriage has been celebrated have, according to English law, a right to determine whether the acts gone through by the parties to the marriage constituted a valid marriage according to the laws of that country. This jurisdiction is independent of the domicile of the parties. Our Rule cannot be laid down as absolutely certain. There appears to be no reported case which precisely decides how far our Courts admit the jurisdiction of the Courts of a foreign country to determine the validity of a marriage there celebrated. But English Courts have assumed jurisdiction for themselves to determine the validity of a marriage celebrated in England, even in the case of parties not domiciled in England,³ and there is no apparent reason why they should not concede an analogous jurisdiction to the Courts of a foreign country.

Two points are clear. First, The Courts of a country where a marriage is celebrated have no exclusive jurisdiction to determine its validity, for our Courts will determine the validity of a marriage celebrated abroad.⁴ Secondly, English Courts do not attach much importance to any decision as to the validity of a marriage given by the Court of a foreign country, *e. g.*, Belgium, which is

¹ Whether the submission of the parties to the jurisdiction of a foreign divorce Court, *e. g.*, by the appearance of the respondent without protest, is held by English judges to give the foreign Court jurisdiction, is very questionable, though it has been held that such appearance gives jurisdiction to an English divorce Court. *Zycklinski v. Zycklinski*, 1862, 2 Sw. & Tr. 420.

² See *Story*, ss. 595–597; *Roach v. Garvan*, 1748, 1 Ves. Sen. 157; *Sinclair v. Sinclair*, 1798, 1 Hagg. Const. 294.

³ *Simonin v. Mallac*, 1860, 2 Sw. & Tr. 67; 29 L. J. P. & M. 97.

⁴ *Ruding v. Smith*, 1821, 2 Hagg. Const. 371. See *Kent v. Burgess*, 1840, 11 Sim. 361; but compare *Roach v. Garvan*, 1748, 1 Ves. Sen. 157.

not the country, *e. g.*, France, where the marriage was celebrated, and it would seem that the Courts of a foreign Country are not, in general at least, held by English judges to be Courts of competent jurisdiction for determining the validity of a marriage which does not take place in such foreign country.

"The validity of marriage," says Lord Stowell, "however, must depend in a great degree on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized, would carry with it great authority in this country; but I am not prepared to say that a judgment of a third country, on the validity of a marriage, not within its territories, nor had between subjects of that country, would be universally binding. For instance, the marriage alleged by the husband is a French marriage; [*i. e.*, a marriage celebrated in France]. A French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a Court at Brussels, on a marriage in France, would have the same authority, much less on a marriage celebrated here in England."¹

Illustrations.

1. *H*, an Englishman, and *W*, an Englishwoman, domiciled in England, go through what purports to be the celebration of a marriage in France. *H* takes proceedings in a French Court to have the marriage declared invalid on account of the neglect of some of the forms required by French law. *Semble*, the French Court has jurisdiction to determine the validity of the marriage.²

2. *H* and *W*, an Englishman and an Englishwoman, domiciled in England, go through what purports to be the celebration of a marriage in France. Afterwards, when *H* and *W* are domiciled in Belgium, *H* obtains a sentence of nullity of marriage in a Belgian Court. Whether the Court has jurisdiction?³

¹ Judgment of Lord Stowell, *Sinclair v. Sinclair*, 1798, 1 Hagg. Const. 297.

² See *Roach v. Garvan*, 1748, 1 Ves. Sen. 157.

³ *Sinclair v. Sinclair*, 1798, 1 Hagg. Const. 294.

NOTE.

BANKRUPTCY JURISDICTION OF FOREIGN COURTS. — English judges have hardly enunciated any general doctrine as to the bases of bankruptcy jurisdiction. Two questions which bear on the jurisdiction in bankruptcy, properly exercisable by a foreign tribunal, have called for consideration by our Courts.

First. What is the extra-territorial effect of a foreign bankruptcy as an assignment?

As to this see chap. xvii., Rules 106–110, *post*.

Secondly. What is the extra-territorial effect of a foreign bankruptcy as a discharge?

As to this, see chap. xvii., Rules 111–114, *post*.

As to the jurisdiction of the proper Court, in Ireland or in Scotland, to wind up a company in England, see Companies Act, 1862 (25 & 26 Vict. cap. 89), s. 81. It is strictly analogous to the jurisdiction of the Court, as stated in Rules 59 to 60, pp. 303–305, *ante*, in regard to winding-up a company in Ireland or Scotland, respectively.

AMERICAN NOTES.

CHAPTER XIV.

JURISDICTION IN MATTERS OF DIVORCE AND AS REGARDS VALIDITY OF MARRIAGE.

THE jurisdiction of the Courts of a foreign country to dissolve the marriage of persons domiciled in such country is discussed, both in its international and its interstate aspect, in the American Notes under chap. xvi., where they treat of the validity of foreign decrees of divorce and of nullity. It is there laid down that the basis of jurisdiction is domicile, and that generally the place of the offence is immaterial. In *Roth v. Roth*, 104 Ill. 35 ; 44 Am. Rep. 81, a Würtemberg decree annulling the marriage of persons domiciled in that country was admitted to have the same effect in Illinois, where the marriage was celebrated and where it was valid, and where the parties were domiciled at the time of its celebration, though the decree was granted for a cause not recognised by the laws of Illinois as affecting the validity of marriage in that State. In *Hood v. Hood*, 11 Allen, 196, the Supreme Judicial Court of Massachusetts recognised, on the ground of jurisdiction arising from domicile, the validity of the decree of an Illinois court granting to a husband who was domiciled in Illinois a divorce from his wife, who was then living in Massachusetts, though the marriage was performed in Massachusetts, where the parties were at the time domiciled, and though the facts on which the decree was granted would not have warranted a divorce in Massachusetts. See a clear statement of the law to this effect in *Ross v. Ross*, 129 Mass. 243, 248. See also, *Adams v. Adams*, 154 Mass. 290 ; 28 N. E. 260.

CHAPTER XV.

JURISDICTION IN MATTERS OF ADMINISTRATION AND SUCCESSION.

RULE 86.¹ — The Courts of a foreign country have jurisdiction to administer, and to determine the succession to, all immovables and movables of a deceased person locally situate in such country.

This jurisdiction is unaffected by the domicile of the deceased.

Comment and Illustration.

This Rule is merely an application or result of Rule 82. There is no reason, it may be added, to suppose that English Courts deny to foreign tribunals in matters of administration as extensive a jurisdiction as they claim for themselves.

N, an Englishman domiciled in England, dies in England, intestate, leaving £10,000 in New York. Administration is taken out in New York. The New York Courts have jurisdiction to administer the £10,000, and if they see fit, to determine who are the persons entitled to succeed ~~beneficially to the distributable~~ residue of the £10,000.²

RULE 87.³ — The Courts of a foreign country have jurisdiction to determine the succession to all movables wherever locally situate of a testator or intestate dying domiciled in such country.

¹ See *Story*, ss. 591, 592, cited pp. 384, 385, *ante*, and Rule 82, p. 384, *ante*, and compare Rule 140, p. 530, *post*.

² Compare *Enohin v. Wylie*, 1862, 10 H. L. C. 1.

³ Compare *In re Trufort, Trafford v. Blanc*, 1887, 36 Ch. D. 600; *Enohin v. Wylie*, 1862, 10 H. L. C. 1; 31 L. J. (Ch.) 402; *Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301. Compare *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34, and *Ewing v. Orr Ewing*, 1885, 10 App. Cas. 453.

Comment.

If a deceased person is at the moment of his death domiciled abroad, the Courts of his domicile have jurisdiction, though not necessarily exclusive jurisdiction, to decide upon the right to the succession to his property.

"The rule to be extracted from [the] cases appears to be this, "that although the parties claiming to be entitled to the estate of "a deceased person may not be bound to resort to the tribunals "of the country in which the deceased was domiciled, and although the Courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and in "such case may be bound to ascertain as best they can who, according to the law of the domicile, are entitled to that estate, yet "where the title has been adjudicated upon by the Courts of the "domicile, such adjudication is binding upon, and must be followed "by, the Courts of this country."¹

Illustrations.

1. T dies domiciled in France; he leaves money, goods, etc., both in France and in England. The French Courts have jurisdiction to determine whether *A* is or is not entitled to succeed to *T*'s money, etc., in France and in England.²

2. T, an Englishman and a British subject, dies domiciled in Portugal. He leaves at his death goods in England. *A* claims to be, under Portuguese law, entitled to succeed to *T*'s movable property, and *inter alia* to the English goods. *A* would not be, according to English law, a legitimate son of *T*. The Portuguese Courts have jurisdiction to determine whether *A* is entitled to succeed to *T*'s movables.³

¹ *In re Trufo*, 1887, 36 Ch. D. 600, 611, per *Stirling*, J.

² *Ibid.*

³ *Doglioni v. Crispin*, 1866, L. R. 1 H. L. 301.

CHAPTER XVI.

EFFECT OF FOREIGN JUDGMENTS IN ENGLAND.¹

I. GENERAL.

(i) *No Direct Operation.*

RULE 88.—A foreign judgment has no direct operation in England.

This Rule must be read subject to the effect of Rule 101.²

Comment.

A foreign judgment³ does not operate directly in England. The judgment of, *e. g.*, a French Court, cannot be enforced here by execution.

(ii) *Invalid Foreign Judgments.*

RULE 89.—Any foreign judgment which is not pronounced by a Court of competent jurisdiction⁴ is invalid.⁵

Whether a Court which has pronounced a foreign judgment is, or is not, a Court of competent jurisdiction in respect of the matter adjudicated upon by the Court is to be determined in accordance with Rules 76 to 87.

¹ As to foreign judgments, see *Westlake*, 3rd ed., chap. xvii. ; *Story*, ss. 584–618 ; *Wharton*, ss. 646–675 ; *Savigny*, *Guthrie's transl.*, 2nd ed., pp. 240–242 ; *Foote*, chap. xi., pp. 543–582 ; *Nelson*, pp. 338–375 ; and generally, see *Piggott*, *Foreign Judgments*.

² *I. e.*, Rule as to extension of certain judgments of Superior Court in one part of United Kingdom to any other part ; and see the Judgments Extension Act, 1868, 31 & 32 Vict. cap. 54.

See also, Inferior Courts Judgments Extension Act, 1882, 45 & 46 Vict. cap. 31, and *Piggott*, pp. 362, 363. The effect of this Act is purposely not embodied in this Digest.

³ For definition of “foreign judgment,” see p. 361, *ante*.

⁴ For meaning of “Court of competent jurisdiction,” see Rule 76, p. 361, *ante*.

⁵ *I. e.*, of course, invalid in England. See *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A. C. 670, 684, *per Curiam*.

The validity of a foreign judgment is not, in general, affected by the fact that the Court which pronounces the judgment is not a proper Court¹ (?).

Comment.

A judgment pronounced by a Court which is not a "Court of competent jurisdiction" in the sense in which the term is used in this Digest is a decision given by a Court with reference to a matter which, according to the principles maintained by our judges, the foreign Court had no right to determine. Hence the judgment is necessarily invalid in England, or to look at the same thing from another point of view, the right acquired under the foreign judgment is not "duly" acquired, and is therefore not a right which is entitled to recognition in England.²

Question.—*Is a judgment pronounced by a foreign tribunal which is a Court of competent jurisdiction but is not a "proper Court,"³ valid?*

The answer to this question is open to some doubt.⁴

The general current of authority favours the validity of such a judgment.

Thus it has been held that it is no answer to an action in England on a French judgment against a French citizen domiciled in France, that the Court giving the judgment was not a Court of competent jurisdiction according to French law, *i. e.*, was not a proper Court,⁵ and with reference to this case Westlake writes: "If the foreign suit was not brought in the right Court of a country territorially competent, this was matter of defence which ought to have been pleaded in that Court. . . . And the party is therefore estopped from taking the objection in England."⁶

¹ *Vanquelin v. Bouard*, 1863, 33 L. J. C. P. 78; *Westlake*, p. 349; *Foote*, pp. 546, 547.

But contrast *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414, 429. For meaning of "proper Court," see Rule 76, p. 361, *ante*.

² See Intro., General Principle No. I., p. 22, *ante*.

³ See Rule 76, p. 361, *ante*.

⁴ Contrast *Vanquelin v. Bouard*, 1863, 15 C. B. N. S. 341; 33 L. J. C. P. 78, and *Westlake*, 3rd ed., p. 349, in favour of the validity of such judgment, with the opinion of *Blackburn, J.*, in *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414, 429, cited p. 402, *post*. See also, *Godard v. Gray*, 1870, L. R. 6 Q. B. 139, 149.

⁵ *Vanquelin v. Bouard*, 1863, 15 C. B. N. S. 341.

⁶ The whole passage from *Westlake* is worth citation. "It must be observed," he writes, "that the competence which has been spoken of in this chapter is territorial competence, and has nothing to do with the rules by which litigation may be portioned out among different courts existing in

On the other hand, judicial language has certainly been used which seems to imply that the validity of a foreign judgment may depend on the Court pronouncing it being a proper Court. Thus with reference to the validity of a judgment *in rem* it has been laid down: "We think the inquiry is, first, whether "the subject-matter was so situated as to be within the lawful "control of the state under the authority of which the Court "sits [*i. e.*, whether the Court was a Court of competent jurisdiction]; and, secondly, whether the sovereign authority of that "state has conferred on the Court jurisdiction to decide as to the "disposition of the thing, and the Court has acted within its jurisdiction [*i. e.*, whether the Court is a proper Court]. If these "conditions are fulfilled, the adjudication is conclusive against all "the world."¹ Whence it might be inferred that, at any rate in the opinion of Lord Blackburn, it was a condition of the validity of a foreign judgment that it should be pronounced by a proper Court, or, in other words, that the Court giving the judgment should possess not only extra-territorial competence, but also intra-territorial competence; and no doubt at first sight it appears a paradox that a judgment pronounced by a foreign, *e. g.*, by a French Court, which has not authority to give judgment under French law, should ever be held valid in England.

The difficulties of the question raised and the apparent difference of opinion between high authorities may be removed by the following considerations.

When a foreign, *e. g.*, a French, Court, which from an international point of view is a Court of competent jurisdiction, delivers a judgment in excess of the authority conferred upon the Court

"the same country, as for instance between the tribunals of commerce and "what are called civil tribunals in France. If the foreign suit was not brought "in the right court of a country territorially competent, this was matter of "defence which ought to have been pleaded in that court: *Vanquelin v. Bouard*, 1863, 15 C. B. N. S. 341; pp. 350, 13th plea, 368, *Erle*, and 374, *Keating*. And the party is therefore estopped from taking the objection in "England, as we shall see in s. 328. But since territorial competence is the "ground of the duty under which the party lies to obey the foreign judgment, "he must be entitled to question that competence when an action is brought "against him for non-performance of such duty." — *Westlake*, 3rd ed., p. 349.

It must, however, be noted that by "territorial competence" Westlake apparently means "international," or what I have termed "extra-territorial" competence. Here, as elsewhere, the difficulty of dealing with the problems of private international law is increased by the fact that different writers either use the same terms with different meanings, or describe the same things in different terms.

¹ *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414, 429, opinion of Blackburn, J.

by French law, the judgment, though obviously not pronounced by a proper Court, may bear one of two different characters. It may be *irregular*, but have validity in France until it is set aside; or it may be a complete *nullity*, and have no legal effect whatever in France.

If, on the one hand, the judgment is simply irregular, and, until it is set aside, gives *A* a right in France, *e. g.*, to the payment of a sum of money by *X*, then it ought to be held valid in England, for *A* has acquired a right under French law, and English Courts are not Courts of Appeal from the judgment of a foreign tribunal.

If, on the other hand, the judgment is in France a mere nullity, and *A*, in whose favour it is given, acquires under it no rights in France, then it should be treated as invalid in England, for *A* has acquired no right under French, or any other law which he is entitled to enforce in England.¹

To this it may be added that a judgment in fact pronounced by a foreign Court of competent jurisdiction is far more likely to be irregular than void. The practical result, therefore, follows that a judgment pronounced by a foreign Court of competent jurisdiction is generally valid in England, even though not pronounced by a proper Court.

Illustrations.

1. *A* obtains judgment in a French Court against *X*, a British subject, for £100. The debt has been contracted, if at all, in England. *X* has never been in France, and there is no circumstance in the case giving the French Court, in the opinion of English judges, a right to pronounce judgment against *X* (*i. e.*, the French tribunal is not a Court of competent jurisdiction).² The judgment is invalid.³

2. *X* is the owner of a British ship. An action *in rem* is brought by *A* against the ship in a Louisiana Admiralty Court. The ship is not, and never has been, in fact, under the control of the Court, nor within the territorial limits of the State of Louisiana. The Court gives judgment in favour of *A*. The judgment is invalid.⁴

3. *X*, a British subject, is the owner of a British ship. At the

¹ See Intro., General Principle No. I., p. 22, *ante*.

² See as to jurisdiction of foreign Courts in actions *in personam*, Rules 80, 81, pp. 369, 379, *ante*.

³ *Schibsby v. Westernholz*, 1870, L. R. 6 Q. B. 155.

⁴ See as to jurisdiction of foreign Courts in actions *in rem*, Rule 82, p. 384, *ante*.

suit of *A*, the ship is arrested when just outside the territorial waters of France, and an action *in rem* is brought against the ship in a French Admiralty Court. Judgment is given against the ship. The judgment is invalid.¹

4. The Scotch Court of Session, at a time when *H* is domiciled in England, grants *H* a divorce from his wife, *W*. The Court of Session not being a Court of competent jurisdiction,² the sentence of divorce is invalid.

5. *A*, a French citizen resident in France, obtains judgment against *X*, a French citizen resident in France, for a debt due from *X* to *A*. The French Court has under French law jurisdiction only over traders. *X* is not a trader. The French Court is not a proper Court in which to sue *X*. No steps are taken by *X* to get the judgment of the French Court set aside. The judgment is (probably) valid.³

RULE 90.⁴ — A foreign judgment is invalid which is obtained by fraud.

Such fraud may be either

- (1) fraud on the part of the party in whose favour the judgment is given ; or
- (2) fraud on the part of the Court pronouncing the judgment.

Comment.

Any judgment whatever,⁵ and therefore, any foreign judgment, is, if obtained by fraud, invalid. The party contesting the validity of a judgment may prove fraud even though this cannot be done without re-trying the questions adjudicated upon by the foreign Court.

¹ Compare *Borjesson v. Carlberg*, 1878, 3 App. Cas. 1316 ; *Simpson v. Fogo*, 1860, 1 J. & H. 18 ; 1863, 1 H. & M. 195. But see Exception to Rule 94, p. 411, *post*.

² See as to jurisdiction of foreign Courts in matters of divorce, Rules 83, 84, pp. 387, 392, *ante*.

³ *I. e.*, in England, *Vanquelin v. Bouard*, 1863, 15 C. B. n. s. 341 ; 33 L. J. C. P. 78.

⁴ As to effect of fraud on validity of judgment generally, see *Duchess of Kingston's Case*, 1776, 2 Sm. L. Cas., 9th ed., 812 ; compare *Nouvion v. Freeman*, 1887, 37 Ch. D. (C. A.) 244, 249, judgment of Cotton, L. J. ; on judgments *in personam*, *Aboulloff v. Oppenheimer*, 1882, 10 Q. B. D. (C. A.) 295 ; *Vadala v. Lawes*, 1890, 25 Q. B. D. (C. A.) 310 ; on judgments *in rem*, *Story*, s. 592 ; on judgments of divorce, *Shaw v. Gould*, 1868, L. R. 3 H. L. 55, 71, language of Lord Cranworth, p. 77, language of Lord Chelmsford.

⁵ *Ochsenbein v. Papelier*, 1873, L. R. 8 Ch. 695.

"There are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. First of all, there is the rule which is perfectly well established and well known, that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English Court or of a foreign Court does not matter; using general language, that is a general proposition unconditional and undisputed. Another general proposition which, speaking in equally general language, is perfectly well settled, is, that when you bring an action on a foreign judgment, you cannot go into the merits which have been tried in the foreign Court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits.

"Which rule is to prevail? That point appears to me to have been one of very great difficulty before the case of *Abouloff v. Oppenheimer*.¹ At the time when that case was decided, namely, in 1882, there was a long line of authorities including *Bank of Australasia v. Niass*,² *Ochsenbein v. Papelier*,³ and *Cammell v. Sewell*,⁴ all recognising and enforcing the general proposition, that in an action on a foreign judgment you cannot re-try the merits. But until *Abouloff's Case*⁵ the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud to prove it without re-opening the merits had never come forward for explicit decision. That point was raised directly in the case of *Abouloff v. Oppenheimer*, and it was decided. I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can re-open the whole case even although you will have in this Court to go into the very facts which were investigated, and which were in issue in the foreign Court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this Court you have to consider whether the foreign Court has been imposed upon. That, to my mind, is only meeting technical argument by a technical answer, and I do not attach much importance to it; but in that case the Court faced the difficulty that you could not give effect to the

¹ 10 Q. B. D. 295.

² 16 Q. B. D. 717.

³ L. R. 8 Ch. 695.

⁴ 5 H. & N. 728.

⁵ 10 Q. B. D. 295.

"defence without re-trying the merits. The fraud practised on the Court, or alleged to have been practised on the Court, was the misleading of the Court by evidence known by the plaintiff to be false. That was the whole fraud. The question of fact, whether what the plaintiff had said in the Court below was or was not false, was the very question of fact that had been adjudicated on in the foreign Court; and, notwithstanding that was so, when the Court came to consider how the two rules, to which I have alluded, could be worked together, they said: 'Well, if that foreign judgment was obtained fraudulently, and if it is necessary, in order to prove that fraud, to re-try the merits, you are entitled to do so according to the law of this country.' I cannot read that case in any other way."¹

The fraud which vitiates a judgment must generally be fraud of the party in whose favour the judgment is obtained, but it may (conceivably at any rate) be fraud on the part of the foreign Court giving the judgment, as where a Court gives judgment in favour of *A*, because the judges are bribed by some person, not the plaintiff, who wishes judgment to be given against *X*, the defendant.

The doctrine that fraud vitiates a judgment applies in principle to foreign judgments of every class.

It is clearly applicable to a judgment *in personam*.² It applies to a judgment or sentence of divorce,³ and our Courts constantly refuse to treat as valid a divorce obtained from a foreign Court by fraud or collusion between the parties. It applies further, at any rate, between the litigants, to a judgment *in rem*. "The doctrine, however," writes Story [that in proceedings *in rem*, the judgment of a Court of competent jurisdiction is conclusive], "is always to be understood with this limitation, that the judgment has been obtained *bonâ fide* and without fraud; for if fraud has intervened, it will doubtless avoid the force and validity of the sentence."⁴ But it is questionable whether the fraud which, as between the litigants, vitiates a judgment *in rem* affects the rights of third persons, *e. g.*, *bonâ fide* purchasers, who in ignorance of the fraud acquire under or in consequence of the judgment a title to the *res*, *e. g.*, a ship, affected thereby.

¹ *Vadala v. Lawes*, 1890, 25 Q. B. D. (C. A.) 310, 316, 317, per *Lindley*, L. J.

² *Vadala v. Lawes*, 1890, 25 Q. B. D. (C. A.) 310.

³ *Shaw v. Gould*, 1868, L. R. 3 H. L. 55; *Niboyet v. Niboyet*, 1875, 4 P. D. (C. A.) 1, 8, 9, judgment of *James*, L. J.; *Dolphin v. Robins*, 1859, 7 H. L. C. 390; 29 L. J. P. & M. 11. See *Bonaparte v. Bonaparte*, [1892] P. 402.

⁴ *Story*, s. 592.

"Fraud," it has been said by Mr. Justice Blackburn, in reference to this very question, "will indeed vitiate everything; though we may observe that there is much force in what Mr. Mellish suggested in the course of his argument in this case, that even if there had been fraud on the part of the litigants, or even of the tribunal, it would be very questionable whether it could be set up against a *bonâ fide* purchaser who was quite ignorant of it."¹

Illustrations.

1. *A* obtains in a Russian Court a judgment against *X* that *X* shall either deliver to *A* certain goods of *A*'s, then, as alleged, in *X*'s possession, or pay *A* a sum equivalent to £1,050. The judgment, which is affirmed on appeal to a superior Russian Court, is obtained by *A*'s fraudulently concealing from the Court that at the very moment when the action is brought, the goods are in the possession of *A*. The judgment is invalid.²

2. *A* brings an action in Sicily against *X* to recover money alleged to be due on certain bills of exchange. *A* obtains judgment against *X* by fraudulently representing to the Italian Court that the bills of exchange were given under the authority of *X* and for mercantile transactions, whereas they were given without *X*'s authority for gambling debts. The judgment is invalid.³

3. *A* obtains a judgment against *X* in a foreign Court. The judgment is given against *X* because *X* declines to bribe the foreign Court. The judgment is invalid.⁴

4. *A* commences an action against *X* in France. It is agreed between *A* and *X* in France that the action shall be dropped and the whole matter in dispute be referred to arbitration in London. *X* under this arrangement returns to England. *A* fraudulently, and in breach of this arrangement, continues the action in France, and recovers judgment against *X* in a French Court for a sum equivalent to £220. The judgment is invalid.⁵

5. *H* and *W* obtain a divorce in a Scotch Court by collusion and fraud. The sentence of divorce is invalid.⁶

¹ *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414, 433, opinion of *Blackburn*, J. See *Exception*, p. 411, *post*, and Rule 140, p. 530, *post*.

² *Aboulloff v. Oppenheimer*, 1882, 10 Q. B. D. (C. A.) 295.

³ *Vadala v. Lawes*, 1890, 25 Q. B. D. (C. A.) 310.

⁴ It is difficult to find any reported case of fraud on the part of a tribunal, but it is admitted that such fraud would invalidate the judgment of a Court.

⁵ *Ochsenbein v. Papelier*, 1873, L. R. 8 Ch. 695. See especially, language of *Selborne*, Ch., p. 698.

⁶ *Shaw v. Gould*, 1868, L. R. 3 H. L. 55. Compare *Bonaparte v. Bonaparte*, [1892] P. 402.

6. *X* is the owner of a British ship. *A*, when the ship is in France, brings an action *in rem* against the ship, and by means of fraud obtains from the French Court a judgment against the ship, under which it is assigned to *A* as owner. The judgment is invalid.¹

RULE 91. — A foreign judgment is, possibly, invalid when the Court pronouncing the judgment refuses to give such recognition to the law of other nations as is required by the principles of private international law (?).²

Illustration.

D, domiciled in England, mortgages in England to *A* a ship lying at Liverpool. The ship is seized at New Orleans under a judgment against *D*. *A*, as being, under English law, the owner of the ship, opposes the sale of the ship before the Louisiana Court. The ship is sold under a writ of *fiери facias* for the benefit of *D*'s creditor, and the Louisiana Court refuses to recognise the right to the ship acquired by *A* in England. The refusal is based on the ground that the right was not acquired in such a manner as to be valid by the law of Louisiana. The ship is purchased by *X*. *A* and not *X* is, in England, the owner of the ship, i. e., the Louisiana judgment is invalid, and *X* has not in England a good title to the ship against *A*.³

¹ Compare *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414, 433, opinion of *Blackburn, J.*

² *Simpson v. Fogo*, 1863, 32 L. J. Ch. 249; 1 H. & M. 195; 1860, 1 J. & H. 18; 29 L. J. Ch. 657. See, however, *Westlake*, pp. 178, 179; *Foote*, pp. 556, 557, 574; *Piggott*, p. 247.

³ *Simpson v. Fogo*, 1863, 1 H. & M. 195.

"Under these circumstances, having to come to a decision in a case which is entirely new in specie, and which will never arise, as it seems to me, in any other country in the world except Louisiana, I confess I yield to the view of that section of the Judges who considered, in the case of *Castrique v. Imrie*, that even a judgment *in rem* may lose its binding force where there appears on the face of it a perverse and deliberate refusal to recognise the law of the country by which title has been validly conferred. The law of England, being by the comity of nations that which must govern the transfer — the transfer being in England, the parties resident here — the ship an English ship at sea on a voyage from an English port; when I find a foreign Court saying 'we will deal with that ship as the property of the person who has already transferred it,' that seems to me to be so contrary to law, and to what is required by the comity of nations, that I am bound to hold that the property acquired by the Bank of Liverpool must prevail against a sale made on the principle entertained by a foreign Court, that, as between mortgagors and

RULE 92. — A foreign judgment may sometimes be invalid on account of the proceedings in which the judgment was obtained being opposed to natural justice (*e. g.*, owing to want of due notice to the party affected thereby). But in such a case the Court is (generally) not a Court of competent jurisdiction.¹

Comment.

With the justice of the decision arrived at by a foreign Court of competent jurisdiction, our Courts have no concern. A foreign judgment may be perfectly valid, though unjust to the party against whom it is given. But the mode in which a Court proceeds may, it is said, be so opposed to natural justice as to invalidate the judgment of the Court.

This opposition, however, to natural justice in the procedure of a Court generally consists of want of due notice of action to an absent defendant affected by the judgment. This is, in reality, a ground of objection to the jurisdiction of the foreign Court, and it is, to say the least, arguable, that whenever a foreign judgment is impeachable on the ground of opposition to natural justice, it is invalid, if at all, on the ground that the Court is not a Court of competent jurisdiction.²

The objection, moreover, that a defendant did not receive due notice of action, can be taken (it is submitted) only where the defendant at the commencement of the action is not resident in the country where it is brought. If he is, any notice, it is conceived, is sufficient which is in accordance with the law of the foreign country.³

"mortgagees, the mortgagees' interest is wholly to be extinguished, and the "right of the mortgagors is paramount and absolute." *Simpson v. Fogo*, 1863, 1 H. & M. 195, 247, judgment of *Page Wood*, V. C. These words show that the principle established by or relied upon in *Simpson v. Fogo* is (even if not of doubtful validity) at any rate of very narrow application. It would seem only to apply where the Court of a foreign country bases its judgment on the deliberate refusal to recognise a right duly acquired under the law of England.

¹ *Buchanan v. Rucker*, 1808, 9 East, 192; *Henderson v. Henderson*, 1844, 6 Q. B. 288; 13 L. J. Q. B. 274, 277; *Sheehy v. Professional Life Assurance Co.* 1857, 2 C. B. N. s. 211; 26 L. J. C. P. 302; *Crawley v. Isaacs*, 1867, 16 L. T. 529; and compare for good statement of law, *Piggott*, pp. 167-174.

² Compare *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155.

³ Compare *Foots*, pp. 560-563.

Illustrations.

1. A judgment is given in a Danish Court with regard to the validity of a will. The Court is constituted in accordance with Danish law of persons, some of whom are interested in the property in dispute. The judgment in favour of such persons is opposed to natural justice, and is invalid.¹

2. A obtains a judgment in France against X, who is not a French citizen, and who is not in France, and has never been resident in France; and the only notice given to X is, in accordance with French law, a service of summons on a French official. X does not appear, and judgment is obtained against him. The judgment is invalid.²

RULE 93.—A foreign judgment shown to be invalid under any of the foregoing Rules, 89 to 92, is hereinafter termed an invalid foreign judgment.

RULE 94.—An invalid foreign judgment has (subject to the possible exception hereinafter mentioned) no effect.³

Comment.

When it is established that a foreign judgment to which effect is to be given in England is invalid, the judgment has no effect in England.

A Scotch or Irish judgment which, in conformity with Rule 101, is extended to England by means of a certificate registered under the Judgments Extension Act, 1868, cannot (apparently) be shown in England to be invalid. The judgment itself, therefore, must be treated as a valid judgment in England unless and until it is set aside by proper proceedings in Scotland or Ireland.⁴

¹ *Price v. Dewhurst*, 1837, 8 Sim. 279.

² Compare *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155. In *Schibsby v. Westenholz*, the defendant residing in England had notice of the action substantially equivalent to that which might have been given to absent defendants under C. L. P. Act, 1852, ss. 18, 19. The French procedure could not therefore be condemned by an English Court as contrary to natural justice. The real objection to it was that the French Court was not under the circumstances a Court of competent jurisdiction.

³ *I. e.*, in England.

⁴ Note that if an action be brought on a Scotch or Irish judgment in England, the judgment may, like any other foreign judgment, be shown to be invalid.

Illustrations.

1. *A* obtains judgment in a French Court against *X* for a debt amounting to £100. The judgment is invalid. *A* cannot maintain an action against *X* on the judgment in England.¹

2. The Scotch Court of Session divorces *H* from his wife, *W*. The divorce is invalid. *H*, during the lifetime of *W*, marries *N* in England. The marriage with *N* is invalid, and *H* is liable to be convicted of bigamy.²

3. A foreign Admiralty Court gives a judgment *in rem* against an English ship. The judgment is invalid. If the ship comes to England the judgment cannot be enforced against the ship by an action *in rem*.³

Exception. — An invalid foreign judgment *in rem* may possibly have an effect in England as an assignment, though not as a judgment.⁴

Comment.

A foreign judgment, given in an action *in rem*, *e. g.*, against a ship, may, as already pointed out, though invalid as a judgment, and indeed for any purpose as between the litigant parties, have an effect in England as a valid assignment of the ship to a third party; for if the ship, whilst still in the country where the judgment was given, is assigned under or by virtue of the judgment, *e. g.*, by the sale of the ship, under the order of the Court giving the judgment, to a *bonâ fide* purchaser, the assignment is valid by the *lex situs*, and therefore *primâ facie* valid everywhere; in other words, the judgment has an effect as an assignment.

Illustration.

A foreign Admiralty Court gives a judgment *in rem* against a British ship owned by *A*, an Englishman. The judgment is obtained by the fraud of the plaintiff. The ship is under the judgment sold to *X*, a *bonâ fide* purchaser, who knows nothing of the fraud. When the ship comes to England, *A* lays claim to the ship, and shows that the foreign judgment was obtained by fraud. Semble, that *X* has a good title as against *A*, *i. e.*, that the judgment, though invalid, has an effect in England as an assignment.⁵

¹ *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155.

² *Lolley's Case*, 1812, 2 Cl. & F. 567. See *Shaw v. Gould*, 1868, L. R. 3 H. L. 55.

³ See as to such an action, Rule 103, p. 429, *post*.

⁴ See *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414, 433, opinion of *Blackburn, J.*; and compare Rule 140, p. 530, *post*.

⁵ *Ibid.*

(iii) *Valid Foreign Judgments.*

RULE 95. — A foreign judgment, which is not an invalid foreign judgment under Rules 89 to 92, is valid, and is hereinafter termed a valid foreign judgment.

RULE 96.¹ — Any foreign judgment is presumed to be a valid foreign judgment unless and until it is shown to be invalid.

RULE 97.² — A valid foreign judgment is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either

- (1) of fact,³ or
- (2) of law.⁴

Comment.

"The decisions of the Court of Queen's Bench in *Bank of Australasia v. Nias*,⁵ of the Court of Common Pleas in *Bank of Australasia v. Harding*,⁶ and of the Court of Exchequer in *De Cosse Brissac v. Rathbone*,⁷ . . . leave it no longer open to contend, unless in a Court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law,"⁸ and this holds

¹ *Alivon v. Furnival*, 1834, 1 C. M. & R. 277; *Bank of Australasia v. Nias*, 1851, 16 Q. B. 717; *Henderson v. Henderson*, 1844, 6 Q. B. 288; *Robertson v. Struth*, 1844, 5 Q. B. 941.

"A declaration upon the judgment of a foreign Court need not state that the Court had jurisdiction over the parties or the cause, every presumption being made in favour of a foreign judgment." *Bullen & Leake*, 3rd ed., pp. 194, 195, note (a).

² *Bank of Australasia v. Nias*, 1851, 20 L. J. Q. B. 284; *Kelsall v. Marshall*, 1856, 1 C. B. N. s. 241; 26 L. J. C. P. 19; *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 238.

³ *Henderson v. Henderson*, 1844, 6 Q. B. 288; 13 L. J. Q. B. 274; *De Cosse Brissac v. Rathbone*, 1861, 6 H. & N. 301; 30 L. J. Ex. 238; *Foote*, p. 564.

⁴ *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414; *Godard v. Gray*, 1870, L. R. 6 Q. B. 139; *Scott v. Pilkington*, 1862, 2 B. & S. 11; 31 L. J. Q. B. 81; *De Cosse Brissac v. Rathbone*, 1861, 6 H. & N. 301; 30 L. J. Ex. 38.

⁵ 16 Q. B. 717; 20 L. J. Q. B. 284.

⁶ 9 C. B. 661; 19 L. J. C. P. 345.

⁷ 6 H. & N. 301; 30 L. J. Ex. 238.

⁸ *Godard v. Gray*, 1870, L. R. 6 Q. B. 139, 150-152, judgment of *Blackburn, J.* It was indeed at one time maintained that a foreign judgment was merely

whether the mistake be an error with regard either to foreign law or to English law, and whether such mistake do, or do not, appear on the face of the proceedings.¹ The rights acquired under a foreign judgment stand, in short, in the same position as other rights duly acquired under foreign law,² and are entitled to recognition to, at any rate, the same extent as other rights duly acquired under the law of any civilised country.

"The principle on which an action can be brought on a foreign judgment is that the rights of the parties have been already investigated and determined by a competent tribunal, or that if such rights have not been in fact investigated and determined, it is because the parties, or one of them, have made default and not availed themselves of the opportunities afforded them by the foreign tribunal. In an action on a foreign judgment not impeached for fraud, the original cause of action is not re-investigated here, if the judgment was pronounced by a competent tribunal having jurisdiction over the litigating parties: *Godard v. Gray*;³ *Schibsby v. Westenholz*.⁴ The judgment is treated as *res judicata*, and as giving rise to a new and independent obligation which it is just and expedient to recognise and enforce."⁵

This general principle, though stated in reference to a judgment *in personam*, applies to every kind of judgment; it extends alike to a judgment *in personam*,⁶ to a judgment *in rem*,⁷ and to

evidence of the cause of action, *e. g.*, the debt, in respect of which the judgment was given. See *Houlditch v. Donegal*, 1834, 2 Cl. & F. 470, 477, language of Lord Brougham. But this doctrine may now be considered erroneous.

¹ *Godard v. Gray*, 1870, L. R. 6 Q. B. 139. Semble, that *Meyer v. Ralli*, 1876, 1 C. P. D. 358, must either be treated as depending upon the very special circumstances of the case in which the parties admitted that the law of the foreign tribunal had not been correctly declared by its judgment, or else must be taken as wrongly decided. Compare *Nelson, Private International Law*, p. 357, note (k).

² See Intro., General Principle No. I., p. 22, and pp. 24, 25, *ante*.

³ L. R. 6 Q. B. 139.

⁴ L. R. 6 Q. B. 155.

⁵ *In re Henderson, Nouvion v. Freeman*, 1887, 37 Ch. D. (C. A.) 244, 256, per Lindley, L. J.

⁶ *Godard v. Gray*, 1870, L. R. 6 Q. B. 139; *Schibsby v. Westenholz*, 1870, L. R. 6 Q. B. 155.

⁷ *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414.

"By the comity which is paid by us to the judgment of other Courts abroad of competent jurisdiction we give a full and binding effect to such judgments, as far as they profess to bind the persons and property immediately before them in judgment." *Power v. Whitmore*, 1815, 4 M. & S. 141, 150, judgment of *Ellenborough, C. J.*

a judgment or sentence of divorce,¹ or any other judgment having reference to status.²

The difference between judgments *in personam* and judgments *in rem*, or as to status, lies not in their conclusiveness as to the matter which they decide, but in the nature of the matter which they must be taken to have decided, and as to which therefore alone they are conclusive. When a Court pronounces a judgment *in personam*, it decides only that *A* has a given right against *X*, *e. g.*, a right to the payment of £20 by *X*; the judgment, therefore, is conclusive only as between *A* and *X*, or their representatives. When a Court, on the other hand, pronounces a judgment *in rem*, it determines the title to a thing, *e. g.*, a ship, not as between *A* and *X*, but as regards *A* against all the world. The judgment, therefore, is conclusive against the whole world.³ The same remark applies in principle to a sentence of divorce, for the sentence determines that *H* and *W*, the divorced persons, are, as regards all the world, to be regarded as unmarried persons.

The principle that a foreign judgment is conclusive and unimpeachable upon its merits holds good whether the judgment be relied upon by the plaintiff or by the defendant.⁴

Illustrations.⁵

1. *A* obtains a foreign judgment against *X* for a debt due from *X* to *A*. The judgment is conclusive, and *X* cannot, in an action on the judgment in England, show that the debt was not really owing from *X* to *A*.⁶

2. *A* sues *X* in a French Court for breach of an English charter-party, in which is a clause, "penalty for the non-performance of this agreement estimated amount of freight." The foreign Court, under an erroneous view of English law, treat this clause as fixing the amount of damages recoverable, and therefore give judgment in favour of *A* for £700, the amount of the freight.

¹ *Harvey v. Farnie*, 1882, 8 App. Cas. 43.

² *Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301; *In re Trusfort*, 1887, 36 Ch. D. 600, 611.

³ Compare *Story*, ss. 591, 592.

⁴ *Burrows v. Jemino*, 1726, 2 Str. 733; *Plummer v. Woodburne*, 1825, 4 B. & C. 625; *Bank of Australasia v. Harding*, 1850, 9 C. B. 661; 19 L. J. C. P. 345; *Henderson v. Henderson*, 1843, 3 Hare, 100. Cf. *Nelson*, p. 346.

⁵ In these illustrations it is assumed that the Court is a Court of competent jurisdiction.

⁶ *Tarleton v. Tarleton*, 1815, 4 M. & S. 20.

The judgment, though given under a mistaken view of English law, is conclusive.¹

3. *A* brings an action in England for £200 due to *A* from *X* under a judgment of a New York Court. The judgment is founded on a mistaken view of the law of New York. The judgment is conclusive.²

4. *A* obtains a judgment for debt against *X* in a Canadian Court. *X*, at the time the action is brought in Canada, has been made bankrupt in England, and might have pleaded the bankruptcy in defence to the action. The bankruptcy is not pleaded in Canada. The Canadian judgment is conclusive.³

5. *H* is domiciled in Scotland; he marries *W*, an Englishwoman, in England. Whilst they are domiciled in Scotland, *H* obtains a divorce from *W* in a Scotch Court for a cause for which divorce could not be obtained in England. The sentence of divorce is conclusive.⁴

RULE 98.—A valid foreign judgment has the effects stated in Rules 99 to 105; and these effects depend upon the nature of the judgment.

Comment.

The validity or the conclusiveness of a foreign judgment does not necessarily involve the enforceability thereof in England. The extent to which a foreign judgment, even when valid, can be enforced, or what in other words are its effects in England, is to be determined in accordance with Rules 99 to 105.⁵

¹ *Godard v. Gray*, 1870, L. R. 6 Q. B. 139. See also, *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414.

² *Scott v. Pilkington*, 1862, 2 B. & S. 11; 31 L. J. Q. B. 81. Conf. *De Cosse Brissac v. Rathbone*, 1861, 6 H. & N. 301; 30 L. J. Ex. 238; and contrast *Meyer v. Ralli*, 1876, 1 C. P. D. 358, which (semble) is wrongly decided.

³ *Ellis v. McHenry*, 1871, L. R. 6 C. P. 228.

⁴ *Harvey v. Farnie*, 1882, 8 App. Cas. 43. Compare *Scott v. Attorney-General*, 1886, 11 P. D. 128, which apparently shows that the Scotch Court would have had jurisdiction, and the sentence have been conclusive, even had the parties been domiciled in England at the time of the marriage.

⁵ See pp. 416–431, *post*.

II. PARTICULAR KINDS OF JUDGMENTS.¹(A) JUDGMENT *in Personam*.(a) *As Cause of Action*.

RULE 99. — Subject to the possible exception hereinafter mentioned, a valid foreign judgment *in personam* may be enforced by an action for the amount due under it if the judgment is

(1) for a debt,² or definite sum of money, and

(2) final and conclusive,³

but not otherwise.

Provided that a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given.⁴

Comment.

There is no mode of directly enforcing a foreign judgment in England (unless it be a Scotch or Irish judgment⁵) by execution, but a valid foreign judgment for a debt or fixed sum of money may be enforced by an action on the part of the person in whose favour the judgment is given (generally the plaintiff in the foreign proceedings) for the sum due under the judgment.

As to conditions of enforceability. — The possibility of enforcing a foreign judgment by action, or of bringing (to use the technical term) "an action on the judgment," is subject to two conditions, each of which is essential to the maintenance of the action.

¹ See for authorities as to Foreign Judgments, note 1, p. 400, *ante*.

² *Sadler v. Robins*, 1808, 1 Camp. 253; *Henderson v. Henderson*, 1844, 6 Q. B. 288; *Nouvion v. Freeman*, 1889, 15 App. Cas. 1.

³ *Plummer v. Woodburne*, 1825, 4 B. & C. 625; *Henley v. Soper*, 1828, 8 B. & C. 16; *Paul v. Roy*, 1852, 15 Beav. 433; *Patrick v. Shedden*, 1853, 2 E. & B. 14; 22 L. J. Q. B. 283; *Frayes v. Worms*, 1861, 10 C. B. N. s. 149; 2 *Smith, L. Cas.*, 9th ed., p. 882.

⁴ *Nouvion v. Freeman*, 1889, 15 App. Cas. 1, 13, language of Lord Watson; *Nouvion v. Freeman*, 1887, 37 Ch. D. (C. A.) 242, 255, judgment of Lindley, L. J.; *Scott v. Pilkington*, 1862, 2 B. & S. 11.

⁵ See Rule 101, p. 424, *post*.

First, the judgment must be a judgment for a *debt*.¹ It must order *X*, the defendant in the English action, to pay to *A*, the plaintiff, a definite and actually ascertained² sum of money; if it orders him to do anything else, *e. g.*, specifically perform a contract, it will not support an action.

Secondly, the judgment must be "*final and conclusive*."

"There is [often] a little misapprehension as to what is meant 'by the word 'final.' We require a foreign judgment to be a 'final one, that is to say, it must not be merely what we should call here an interlocutory order, an order not purporting to decide the rights of the parties, but merely requiring something to be done pending the prosecution of the action, either for the purpose of security, or of keeping things as we say *in statu quo* until the trial of the action.'"³

The reason for this is that "to give effect . . . in this country to a . . . judgment [which is not final in the country where it is given] would enable the plaintiff to obtain in this country a greater benefit from it than he could obtain from it in [the country where it is given]. It would be entirely contrary to the principle on which English Courts proceed in enforcing a foreign judgment, if we were to adopt that course."⁴

The test of finality is the treatment of the judgment by the foreign tribunal as a *res judicata*. "In order to establish that [a 'final and conclusive'] judgment has been pronounced, it must be shown that in the Court by which it was pronounced, it conclusively, finally, and forever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties."⁵

"No decision has been [or can be] cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it. All the authorities cited appear to me, when fairly read, to assume that the decree which was given effect to had been pronounced *causâ cognitâ*, and that it was unnecessary to inquire into the merits of the controversy between the litigants, either because these had already been investigated and decided by the foreign tribunal, or because the defendant had

¹ *Henley v. Soper*, 1828, 8 B. & C. 16.

² *Sadler v. Robins*, 1808, 1 Camp. 253.

³ *Nouision v. Freeman*, 1887, 37 Ch. D. (C. A.) 244, 251, judgment of *Cotton*, L. J.

⁴ *Ibid.*, 249, judgment of *Cotton*, L. J. Compare Intro., General Principles Nos. I. and V., pp. 22, 56, *ante*.

⁵ *Nouision v. Freeman*, 1889, 15 App. Cas. 1, 9, judgment of Lord *Herschell*.

"due opportunity of submitting for decision all the pleas which he desired to state in defence."¹

As to proviso.—"In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and if appealable the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal."²

"The fact that a judgment or order may be appealed from, or that it is made in a summary proceeding, does not prevent it from being *res judicata* and actionable in this country."³

"Though the pendency of an appeal in the foreign Court might afford ground for the equitable interposition of [the English] Court to prevent the possible abuse of its process, and on proper terms to stay execution in the action, it could not be a bar to the action itself."⁴

Illustrations.

1. *A* brings an action against *X* in a French Court for breach of contract, and obtains judgment for £1,000. An action for £1,000 is maintainable in England by *A* against *X* on the judgment.⁵

2. *A* recovers judgment against *X* for £1,000 in a colonial Court of Equity in respect of equitable claims. Action maintainable.⁶

3. *A* recovers judgment in a colonial Court against *X* for the payment of £600, the balance due on a partnership debt, and £53 costs. Action maintainable.⁷

4. *A* recovers judgment against *X* in a Jamaica Court, that *X* should pay *A* £3,000, after first deducting thereout *X*'s costs, to

¹ *Nouvion v. Freeman*, 1889, 15 App. Cas. 1, 13, judgment of Lord Watson.

² *Ibid.*

³ *Nouvion v. Freeman*, 37 Ch. D. 244, 255, judgment of Lindley, L. J.

⁴ *Scott v. Pilkington*, 1862, 2 B. & S. 11, 41, *per Curiam*.

⁵ See *Godard v. Gray*, 1870, L. R. 6 Q. B. 139; *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351.

The words "in England" are inserted in this first illustration to remind the reader that the illustrations refer only to proceedings in England. The words "action maintainable," or "no action maintainable," in the subsequent illustrations, mean that *A*, who obtains the foreign judgment, can or cannot enforce it by action.

⁶ *Henderson v. Henderson*, 1844, 6 Q. B. 288.

⁷ *Henley v. Soper*, 1828, 8 B. & C. 16.

be taxed by the proper officer. The costs have not been taxed. The judgment is not a judgment for a fixed sum. No action maintainable.¹

5. *A* obtains a judgment of the Scotch Court of Session against *X*, ordering *X* to pay £500 to *A* on certain terms, pending an appeal by *X* to the House of Lords. It is in effect an interlocutory order for the payment of costs. No action maintainable.²

6. *A* takes certain summary or "executive" proceedings against *X* in a Spanish Court for the recovery of a debt, and obtains a so-called *remate* judgment for £10,000. The judgment is final in these proceedings, subject, however, to reversal on appeal. In these executive proceedings *X* can set up certain limited defences, but cannot dispute the validity of the contract under which the debt arises. Either party, if unsuccessful in the executive proceedings, may in the same Court and in respect of the same matter take ordinary or (so-called) plenary proceedings in which all defences may be set up, and the merits of the matter may be gone into. In the plenary proceedings a *remate* judgment cannot be set up as *res judicata* or otherwise, and a plenary judgment renders the *remate* judgment inoperative. The *remate* judgment is not final and conclusive. No action maintainable on the *remate* judgment.³

7. *A*, in an action in New York, recovers judgment against *X* for £3,000. *X* appeals against the judgment to the New York Court of Appeal. An appeal under the law of New York is not a stay of execution. While the appeal is pending *A* brings in England an action against *X* on the judgment for £3,000. The action is maintainable.⁴

*Exception.*⁵—An action (semble) cannot be maintained on a valid foreign judgment if the cause of action in respect of which the judgment was obtained was of such a character that it would not have supported an action in England (?).

¹ *Sadler v. Robins*, 1808, 1 Camp. 253.

² *Patrick v. Shedden*, 1853, 22 L. J. Q. B. 283; 2 E. & B. 14. Compare *Paul v. Roy*, 1852, 15 Beav. 433. See *Plummer v. Woodburne*, 1825, 4 B. & C. 625.

³ *Nouvion v. Freeman*, 1889, 15 App. Cas. 1.

⁴ *Scott v. Pilkington*, 1862, 2 B. & S. 11. Conf. especially, p. 41, judgment of Cockburn, C. J.

⁵ See *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351; *Huntington v. Attrill*, [1893] A. C. 150; 1892, 146 U. S. 657; *Wisconsin v. Pelican Co.* 1888, 127 U. S. 265; *De Boimont v. Penniman*, 10 Blatch. 436. See *Freeman, Judgments*, s. 588.

Comment.

Transactions which give rise to a right of action in a foreign country may be such that they would not support an action in England.¹ If, then, *A* recovers judgment in a foreign, *e. g.*, in a Belgian, Court for £100 against *X* in respect to some act which would not itself support an action in England, can *A* enforce the Belgian judgment in England by means of an action? On principle this question ought to be answered in the negative, but the question has never, it would appear, come directly before our Courts, and the authorities from which a reply can be drawn are not absolutely conclusive.

Illustrations.

1. In a penal action brought in New York by *A*, a government official, against *X*, a citizen of New York, *A* recovers judgment for £100. *X* is in England. *A* brings an action against *X* on the judgment for £100. The action is (semble) not maintainable.²

2. *X*, a Swiss, enters into a contract in France with *A*, a French subject, in regard to acts to be done in England. The contract, though valid by French law, is void by English law as being in restraint of trade and against public policy. *A* cannot maintain an action in England for any breach of the contract. *X* breaks the contract. *A* brings an action against *X* in France for the breach of contract and recovers £1,000. *A* then brings an action on the French judgment for the £1,000 against *X*, who is in England. Semble, the action is not maintainable?³

3. Under the Code Napoléon, a father-in-law is bound under certain circumstances to make an allowance to his son-in-law if in want, as long as a child of the marriage of the son-in-law with the daughter of the father-in-law is living.

A, a Frenchman, domiciled in France, marries in France *N*,

¹ See as to Penal Actions, Rule 40, p. 220, *ante*, and especially, *Huntington v. Attrill*, 1892, 146 U. S. 657. As to Torts, see Rules 174-176, *post*; *Phillips v. Eyre*, 1870, L. R. 6 Q. B. 1; *The Halley*, 1868, L. R. 2 P. C. 193.

² See *Huntington v. Attrill*, [1893] A. C. 150, where it seems assumed that if the original action had been a penal action, an action would not have been maintainable in England on the judgment given in the original action. Compare especially the language of the Supreme Court in *Wisconsin v. Pelican Co.* 1888, 127 U. S. 265, 290, 291.

³ This illustration is suggested by *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351, where, however, the point does not directly arise.

the daughter of *X*, an Englishman, domiciled in England. While *A* and *X* are residing in France, *A* takes proceedings and obtains a judgment against *X*, his father-in-law, for the payment of an allowance under the Code Napoléon. Part of the allowance is not paid. *A* brings an action in England against *X* (who is in England) for the unpaid part of the allowance as for a debt due on the judgment. Semble, the action is not maintainable.¹

SUB-RULE.—A valid foreign judgment does not of itself extinguish the original cause of action in respect of which the judgment was given.²

Comment.

The judgment of an English Court of record extinguishes the original cause of action.³ If *A* in such a Court recovers judgment for £20 against *X* for a breach of contract or tort, he can issue execution or bring an action against *X* on the judgment, but he cannot bring an action against *X* for the breach of contract, or the tort. A foreign judgment does not extinguish the original cause of action. If *A* recovers in a French Court judgment for £20 against *X* for a debt, he may in England bring an action on the judgment, and he may also, if he chooses, bring an action for the debt.

Illustration.

A, in an action in a Victorian Court against *X* for breach of contract, recovers judgment for £100. The judgment is neither

¹ In the United States it has been held that such an action is not maintainable. See *De Brimont v. Penniman*, 1873, 10 Blatch. 436; *Wharton*, s. 104 b.

Note that the judgment of the United States Court decides two different points. *First*, that in the United States no action was maintainable for the allowance. *Secondly*, that if no action was maintainable for the allowance, no action was maintainable on the French judgment for the portions of the allowance which were due under it.

² *Smith v. Nicolls*, 1839, 5 Bing. N. C. 208; *Hall v. Odber*, 1809, 11 East, 118; 10 R. R. 443; *Bank of Australasia v. Harding*, 1850, 9 C. B. 661; 19 L. J. C. P. 345; *Bank of Australasia v. Nias*, 1851, 16 Q. B. 717; 20 L. J. Q. B. 284; *Kelsall v. Marshall*, 1856, 1 C. B. N. S. 241; 26 L. J. C. P. 19; *Castrique v. Behrens*, 1861, 30 L. J. Q. B. 163. Piggott argues that this sub-rule is in principle unsound (see *Piggott*, 2nd ed., pp. 22-30), and there is considerable force in his arguments. But the authorities for it are too strong to be disputed anywhere but in a Court of Appeal. See *Westlake*, p. 354; *Story*, 8th ed., s. 599 a; *Bullen & Leake*, 3rd ed., p. 194.

³ *Leake, Law of Contracts*, 3rd ed., p. 140.

wholly nor in part satisfied. *A* can bring an action in England against *X* for the breach of the contract.¹

(b) *As Defence.*

RULE 100.² — A valid foreign judgment *in personam*, if it is final and conclusive³ on the merits⁴ (but not otherwise) is a good defence to an action for the same matter when either

- (1) the judgment was in favour of the defendant,⁵ or,
- (2) the judgment being in favour of the plaintiff has been followed by execution or satisfaction⁶ [*i. e.*, has been satisfied].

Comment.

(1) *Judgment for Defendant.* — A foreign judgment in favour of the defendant in the foreign action is a complete answer to any proceedings here for the same matter by the plaintiff in such action, provided that the judgment be final and conclusive on the merits, but it is not an answer to an action in England if it be merely an interlocutory judgment, or a judgment which, though it decides the cause finally in the country where it is brought, does not purport to decide it on the merits, *e. g.*, if it is given in favour of the defendant on the ground that the action is barred by a statute of limitations.⁷

(2) *Judgment for Plaintiff.* — So, again, a foreign judgment in favour of the plaintiff which purports to be final and conclusive on the merits is, if satisfied, an answer to any action brought by the plaintiff, but “a judgment against the defendant in a foreign Court does not operate as a merger of the original cause of

¹ See cases cited in note 2, p. 421, *ante*.

² See *Westlake*, p. 355; *Foot*, pp. 570, 571.

³ As to meaning of “final and conclusive,” see p. 417, *ante*.

⁴ *Harris v. Quine*, 1869, L. R. 4 Q. B. 653.

⁵ *Plummer v. Woodburne*, 1825, 4 B. & C. 625; *General Steam Navigation Co. v. Guillou*, 1843, 11 M. & W. 877; *Ricardo v. Garcias*, 1845, 12 Cl. & F. 368.

⁶ *Smith v. Nicolls*, 1839, 5 Bing. N. C. 208; *Barber v. Lamb*, 1860, 8 C. B. N. S. 95; 29 L. J. C. P. 234.

⁷ *Harris v. Quine*, 1869, L. R. 4 Q. B. 653.

“action,¹ and if not followed by execution or satisfaction is no “defence.”²

Illustrations.

1. *A* brings an action in a Victorian Court against *X* for breach of contract. *X* denies the breach. A judgment which is final and conclusive in Victoria is given in favour of *X*. The judgment is a defence to an action in England against *X* by *A* for the same breach of contract.³

2. *A* brings an action, in the Consular Court of Constantinople, against *X* for a debt of £1,000, and recovers judgment for £45. The £45 are thereupon paid by *X*. *A* thereupon brings an action in England against *X* for the same debt. The judgment of the Consular Court is an answer to the action.⁴

3. *A* brings an action, in the Consular Court of Constantinople, against *X* for a debt of £1,000, and recovers judgment for £45 and costs. *A* obtains no satisfaction for the judgment. *A* brings an action in England against *X* for the £1,000. The judgment of the Consular Court, not having been satisfied, is not an answer to the action.⁵

4. *X*, in October, 1862, incurs a debt to *A*, in the Isle of Man. In 1866, *A* brings an action against *X* for the debt in a Manx Court. Under a Manx statute no action for the debt can be brought more than three years after the cause of action accrues, but the statute does not extinguish the debt. The Manx Court gives judgment in favour of *X* on the ground that the action is barred by the statute. The judgment is not conclusive on the merits. *A* brings an action for the debt in England. The Manx judgment is not an answer to the action.⁶

¹ See Sub-Rule, p. 421, *ante*.

² *Bullen & Leake*, 3rd ed., p. 627.

³ See *Bullen & Leake*, p. 627. Compare *Plummer v. Woodburne*, 1825, 4 B. & C. 625. See also, *Ricardo v. Garcias*, 1845, 12 Cl. & F. 368.

⁴ *Barber v. Lamb*, 1860, 8 C. B. N. s. 95; 29 L. J. C. P. 234.

⁵ Compare *Barber v. Lamb*, 1860, 8 C. B. N. s. 95.

⁶ *Harris v. Quine*, 1869, L. R. 4 Q. B. 653. Compare *Frayes v. Worms*, 1861, 10 C. B. N. s. 149.

(c) *Extension of Certain Judgments in Personam of Superior Court in one Part of United Kingdom to any other Part.*¹

RULE 101.²—A judgment of a Superior Court in any part of the United Kingdom for any debt, damages, or costs, has, on a certificate thereof being duly registered in a Superior Court of any other part of the United Kingdom, from the date of such registration the same force and effect as a judgment of the Court in which the certificate is registered, and may be enforced by execution, or otherwise, in the same manner as if it had been a judgment originally obtained at the date of such registration as aforesaid in the Court in which the certificate is registered.

The term "Superior Court" means in this Rule,

- (1) as applied to England, the High Court of Justice in England ;

¹ See Judgments Extension Act, 1868, 31 & 32 Vict. cap. 54, and especially *Piggott, Foreign Judgments*, 2nd ed., pp. 358-362.

For extension of Judgments of Inferior Courts, see Inferior Courts Judgments Extension Act, 1882, 45 & 46 Vict. cap. 31, and *Piggott*, pp. 362, 363.

² See the Judgments Extension Act, 1868 (31 & 32 Vict. cap. 54), ss. 1-4, 8. This Rule is intended simply to give the general result of the Act as regards the extension of judgments throughout the United Kingdom. It does not follow the precise words of the Act even in regard to the sections referred to. Thus, as pointed out subsequently in the comment (see p. 425), what is enforced in the country where a certificate is registered is, in strictness, not the judgment, but the certificate of the judgment. The Act, further, as it originally stood, applied in England and Ireland only to judgments of the Superior Courts of Common Law. For its extension, as regards the kind of judgments to which it applies, to every Division of the High Court in England or in Ireland, see the Judicature Act, 1873 (36 & 37 Vict. cap. 66), s. 76 ; *Fontaine's Case*, 1889, 41 Ch. D. (C. A.) 118 ; the Judicature Act (Ireland), 1877 (40 & 41 Vict. cap. 57), s. 71. For all details as to procedure, etc., the Judgments Extension Act, 1868, should itself be carefully consulted.

It may also be well to note that the provisions of that Act, in so far as they regard the extension of an Irish judgment to Scotland, or of a Scotch judgment to Ireland, do not in strictness belong to the subject of this treatise.

The Inferior Courts Judgments Extension Act, 1882, 45 & 46 Vict. cap. 31, extends the judgments of Inferior Courts, *e. g.*, County Courts, or Civil Bill Courts, in one part of the United Kingdom, to other parts of the United Kingdom, by provisions analogous to those of the Judgments Extension Act, 1868. No reference to the Inferior Courts Judgments Extension Act is made in this Digest.

(2) as applied to Ireland, the High Court of Justice in Ireland;

(3) as applied to Scotland, the Court of Session in Scotland.

This Rule does not apply to any judgment (decreet) pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland.¹

Comment.

First. This Rule applies only to a judgment for "debt, damages, or costs." It applies, therefore, only to that kind of judgment which is enforceable by action in the Courts of the different parts of the United Kingdom.²

Hence, as has been laid down in a Scotch case, "equity judgments are excluded, and all judgments and decrees *ad facta* "*præstanda*, or of the nature of prohibitions or injunctions;"³ and "so also [are] judgments in actions for the recovery of land, "and in probate and divorce suits,"⁴ at any rate if the judgment in such an action or suit is a judgment for anything more than damages or costs; for if a party to one of these proceedings should, as might be the case, recover judgment as defendant only for damages or costs, there does not appear to be any reason why such a judgment, if recovered, *e. g.*, in Scotland, should not be capable of registration in England.

Secondly. Under this Rule a judgment obtained in one part of the United Kingdom, *e. g.*, in Ireland, can by formal proceedings, as to the details of which the reader should consult the Judgments Extension Act, 1868, be extended to and rendered effective in any other part of the United Kingdom, *e. g.*, in England.⁵

Though "judgments" are in the Judgments Extension Act, 1868, itself described as "registered,"⁶ it is in strictness the "certificate" of a judgment which is registered, and it is also in strictness the certificate, not the judgment, which is given effect to as a judgment of the Court, *e. g.*, the English High Court, in which

¹ 31 & 32 Vict. cap. 54, s. 8.

² Compare Judgments Extension Act, 1868, ss. 1-3, 6, 8.

³ *Wotherspoon v. Connolly*, 1871, Sc. Sess. Cas., 3rd ser., ix. 310.

⁴ See *Piggott*, 2nd ed., 359.

⁵ 31 & 32 Vict. cap. 54, s. 1.

⁶ *Ibid.*, ss. 4, 6.

the registration takes place. The Superior Courts of the different parts of the United Kingdom have, at any rate, as far as relates to execution, full control and jurisdiction over any certificate or judgment registered in conformity with Rule 101,¹ and a certificate cannot be registered more than twelve months after the date of the original judgment without the leave of the Court or a judge of the Court where it is to be registered. This Court, *e. g.*, the English High Court, has authority to prevent execution issuing under the judgment in England, and generally to exercise full control at any rate over the certificate which is the thing actually registered. The certificate, therefore, would be set aside for an irregularity appearing on the face of it;² and execution would not be allowed to issue if the Court where the certificate is registered were properly certified that a stay of execution had been granted by the Court in which the judgment had been obtained.³

Thirdly. The Court in which a certificate is registered under Rule 101 cannot apparently inquire into the validity of the original judgment. Thus if a judgment of the Court of Session be registered in England, the High Court in England cannot, it is submitted, set aside the certificate (as long as the judgment stands in Scotland) on the ground that the judgment was obtained by fraud. If the certificate is to be got rid of on that ground, the judgment must be impeached by proceedings in Scotland.

Fourthly. Rule 101 in no way negatives the right of a plaintiff who has obtained a judgment in one part of the United Kingdom, *e. g.*, Scotland, to bring an action upon it in another part, *e. g.*, England. The plaintiff, however, who brings such an action ex-

¹ See 31 & 32 Vict. cap. 54, s. 4. "The Courts of Common Pleas at Westminster and at Dublin and the Court of Session in Scotland shall have and "exercise the same control and jurisdiction over any judgment or decreet, and "over any certificate of such judgment or decreet, registered under this Act "in such Courts respectively as they now have and exercise over any judgment or decreet in their own Courts, and in so far only as relates to execution "under this Act."

The judgment itself is in this section treated as registered. The authority of the Courts is limited to that which they "now," *i. e.*, in 1868, have and, lastly, it is, in so far as this enactment is concerned, given them in so far only as relates to execution.

² See *Part v. Scannell*, 1875, Ir. R. 9 C. L. 426.

³ This is specially provided for in the case of judgments of the Court of Session which it is proposed to register in the High Court of England or of Ireland (see 31 & 32 Vict. cap. 54, s. 3), and there can be no doubt that if a stay of execution were granted by the English or Irish High Court where a judgment was obtained, the Court of Session on being certified thereof would not allow execution to issue in Scotland. See *Piggott*, p. 358.

poses himself to one, and perhaps to two, disadvantages. He cannot in general recover any costs,¹ and, if the view here taken of the Act is correct, he gratuitously runs the risk of having the judgment impeached for fraud and for other grounds of invalidity which are not available against a registered judgment.

Fifthly. A proceeding on arrestment in Scotland is a mode of asserting the jurisdiction of the Scotch Courts over a defendant who, though not in Scotland, possesses property there. The reason why a judgment obtained in such an action is not allowed to be registered is that, as our Courts do not consider the possession of property to be a sufficient ground of jurisdiction in an action *in personam*, a judgment which depended upon the existence of such jurisdiction could not be enforced by action in England.² Here, as elsewhere, we see that Rule 101, and the Act on which it is grounded, must be strictly confined to judgments on which an action could be brought in England.

(B) JUDGMENT *in Rem*.

RULE 102.³ — A valid foreign judgment *in rem*⁴ in respect of the title to a movable gives a valid title to the movable in England to the extent to which such title is given by or under the judgment in the country where the judgment is pronounced.

Comment.

A valid foreign judgment or judicial proceeding *in rem* which either directly or indirectly determines the title to a movable is conclusive against all the world.⁵ This applies to all proceedings *in rem* against movable property within the jurisdiction of the Court pronouncing the judgment. "Whatever the Court settles "as to the right or title, or whatever disposition it makes of the "property by sale, revendication, transfer, or other act, will be

¹ 31 & 32 Vict. cap. 54, s. 6.

² See Rules 81 and 89, pp. 379, 400, *ante*.

³ *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414; *Hobbs v. Henning*, 1865, 34 L. J. C. P. 117; 1864, 17 C. B. N. s. 791; *Cammell v. Sewell*, 1860, 5 H. & N. 728; 29 L. J. Ex. 350; *In re Queensland &c. Co.* [1891] 1 Ch. 536; [1892] 1 Ch. (C. A.) 219; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238. Compare Rule 140, p. 530, *post*.

⁴ As to jurisdiction in actions *in rem*, see Rule 82, p. 384, *ante*.

⁵ See *Story*, ss. 592-593.

"held valid in every other country, where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem*, in foreign courts of admiralty, whether they are causes of prize, or of bottomry, or of salvage, or of forfeiture, . . . over which such courts have a rightful jurisdiction, founded on the actual or constructive possession of the subject-matter" (*res*).¹

The real principle of a judgment *in rem* is, "that a person who acquires a valid title by the law of any country either to a chattel or to realty shall be deemed all over the world to be owner of such chattel or realty. If, therefore, the Court has absolutely the disposal of the *res*, and it is in its power, as it is in the case of a judgment *in rem* in the Admiralty Court, it does not matter who is owner; all the Courts assume that the thing has been fairly litigated, that the man brought before the Court is owner, and had such an interest as entitled him to raise the contest, and that the judgment *in rem* bound the whole."² In other words, the rule as to the effect of a judgment *in rem* is, if Rule 140 can be maintained to its full extent, merely an application of that Rule.

"In the case of *Cammell v. Sewell*,"³ it has been said by a very eminent judge, "a more general principle was laid down, viz., that 'if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere.' This, we think, as a general rule, is correct, though no doubt it may be open to exceptions and qualifications; and it may very well be said that the rule commonly expressed by English lawyers, that a judgment *in rem* is binding everywhere, is in truth but a branch of that more general principle."⁴

Illustrations.

1. *A* brings an action *in rem* in a French Court against a British ship, the *Ann Martin*, then in the port of Havre, and claims to be the owner of the ship. *A* obtains a judgment in his favour, and is declared to be owner of the ship. *A* has in Eng-

¹ See *Story*, s. 592, cited with approval by *Blackburn, J.*; *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414, 428, 429.

² *Simpson v. Fogo*, 1863, 32 L. J. (Ch.) 249, 256, judgment of *Wood, V. C.*

³ 5 H. & N. 728, 746.

⁴ *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414, 429, per *Blackburn, J.*

land the rights of owner over the *Ann Martin* against all the world.¹

2. *A*, an Englishman, is owner of a British ship. Whilst the ship is at Havre, a French Court, honestly exercising its jurisdiction, pronounces in a proceeding *in rem* a judgment under which the ship is ordered to be sold for the payment of debts due from *M*, and is sold to *X*, a British subject. The Court has acted under a misconception of English law, and in consequence has not recognised the rights of *A* as owner. The ship is brought by *X* to England. *X* has a good title to the ship in England.²

3. A British ship is seized as prize by a Russian vessel, on the ground of attempted breach of blockade, and taken to a Russian port for adjudication as prize by a prize Court. The goods on board the ship are sold under the order of the Court to *X*. It is ultimately decided by the prize Court that the ship was not lawfully captured. The title of *X*, the purchaser, to the goods is valid against that of *A*, the original owner.³

RULE 103.⁴ — A valid foreign judgment *in rem* given by a Court of Admiralty can be enforced in the High Court by proceedings against the ship or other property affected by the judgment.

Illustration.

A brings an action and obtains a judgment *in rem* in a foreign country against the *City of Mecca*, a British ship, then in a port of such country. The *City of Mecca*, the judgment not having been satisfied, comes into an English port. *A* can enforce the foreign judgment by an action *in rem* against the ship.⁵

¹ Compare *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414.

² *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414.

³ See, as to the principle of this case, *Stringer v. English &c. Insurance Co.* 1870, L. R. 5 Q. B. 599, and especially, p. 606, judgment of *Martin*, B.

⁴ *The City of Mecca*, 1881, 6 P. D. (C. A.) 106.

See Rule 47, p. 263, *ante*, and *Williams & Bruce*, p. 107.

⁵ See *The City of Mecca*, 1861, 6 P. D. (C. A.) 106. In that case the Court of Appeal held that the action did not lie, but, semble, that the only reason for this was that the Portuguese judgment was not a judgment *in rem*. Had it (as supposed by the Court below, 5 P. D. 28) been a judgment *in rem*, then an action *in rem* might have been brought against the ship to enforce the judgment.

(C) JUDGMENT, OR SENTENCE, OF DIVORCE.

RULE 104.¹—A valid foreign judgment, or sentence, of divorce has in England the same effect as a divorce granted by the Court.

Comment.

A divorce granted by a foreign Court of competent jurisdiction² has in England the same effects as an English divorce. Restrictions imposed by the foreign law on the freedom of the divorced parties, as to marriage or otherwise, which are not imposed by an English divorce, are here inoperative. But in order that a foreign sentence of divorce should be treated as a divorce in England the sentence must be complete and final; the parties to the marriage must under it be actually divorced; it must not be a sentence which has not become complete, but is to become complete at some future date if certain conditions are fulfilled, *e. g.*, if no appeal is made against it within, say, six months. After these conditions are fulfilled the sentence is final, and the divorce is valid in England; but until they are fulfilled the parties are not in fact divorced; they have not acquired³ the rights of unmarried persons, and they will not be treated in England as divorced.⁴

Illustrations.

1. *H*, an Irishman, and *W*, an Irishwoman, marry in Ireland, where they are domiciled. They afterwards acquire a domicile in the Cape Colony. While they are there domiciled *H* is divorced from *W* by the sentence of a Cape Court on account of *W*'s adultery with *X*. The divorce is, under the law of the Cape, an absolute dissolution of the marriage, but does not allow a husband or wife divorced for adultery to re-marry whilst the injured party remains unmarried. *H* remains unmarried. *X* marries *W*, first at the Cape and afterwards in England. The marriage in England is valid.⁵

2. *W* and *X* are respondent and co-respondent respectively in a divorce suit in India, instituted by *H*, the husband of *W*. A decree absolute dissolving the marriage of *H* and *W* is pronounced

¹ *Scott v. Attorney-General*, 1886, 11 P. D. 128.

² As to jurisdiction, see Rules 83, 84, pp. 387, 392, *ante*.

³ See Intro., General Principle No. I., p. 22, *ante*.

⁴ *Warter v. Warter*, 1890, 15 P. D. 152.

⁵ *Scott v. Attorney-General*, 1886, 11 P. D. 128.

under the Indian Divorce Act, 1869, No. IV. Section 57 of that Act provides that the petitioner or the respondent may marry again after a period of six months from the date of the decree, if no appeal has been made, but not sooner. Within six months after the decree dissolving the marriage of *H* and *W*, *X* marries *W* in England. The marriage is invalid.¹

(D) JUDGMENT IN MATTERS OF SUCCESSION.

RULE 105.²—A valid foreign judgment in matters of succession is binding upon, and is to be followed by, the Court.

Comment.

Immovables.—A judgment as to the succession to immovables by the Courts of the foreign country where the immovables are situate³ is, in so far as its effect can possibly demand the consideration of our judges,⁴ binding on English Courts.

Movables.—When once the rights of succession to the movables (wherever situate) of a testator, or intestate, who has died domiciled in a foreign country, are determined by a Court of that country, English tribunals will follow the decision of the foreign Court.

“The rule to be extracted from [the] cases appears to be this, “that although the parties claiming to be entitled to the estate “[i. e., movables] of a deceased person may not be bound to resort to the tribunals of the country in which the deceased was

¹ *Warter v. Warter*, 1890, 15 P. D. 152. The reason is, that *W* “was subject to the Indian law of divorce, and she could only contract a valid second marriage by showing that the incapacity arising from her previous marriage “had been effectually removed by the proceedings taken under that law. This “could not be done, as the Indian law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. “This is an integral part of the proceedings by which alone both the parties “can be released from their incapacity to contract a fresh marriage. . . . The “distinction between [the case of *Scott v. Attorney-General*] and the present “is, that there the incapacity to remarry imposed by the colonial law only “attached to the guilty party. It was, therefore, penal in its character, and “as such was inoperative out of the jurisdiction under which it was inflicted.” *Warter v. Warter*, 15 P. D. at p. 155, judgment of *Hannen*, President. As to penal status, see chap. xviii., Rule 122, p. 474, *post*.

² *Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301; *In re Trufort*, 1887, 36 Ch. D. 600. See as to jurisdiction, Rules 82, 86, 87, pp. 384, 398, *ante*.

³ See Rules 82, 86, pp. 384, 398, *ante*.

⁴ See chap. iv., Rule 39, p. 214, *ante*.

"domiciled, and although the Courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and in such case may be bound to ascertain as best they can who, according to the law of the domicile, are entitled to that estate, yet where the title has been adjudicated upon by the Courts of the domicile, such adjudication is binding upon, and must be followed by, the Courts of this country."¹

Illustrations.

1. *T*, a natural-born British subject, has under the Naturalization Act, 1870, become naturalized in Switzerland. He is at his death a Swiss citizen, but is domiciled in France. He leaves *A*, a son, whose legitimacy is disputed. *T* has bequeathed all his movables by will to *X*, which, if *A* is legitimate, he has not under Swiss law a right to do. Litigation takes place in Switzerland as to the claims of *A* and *X* respectively to *T*'s movables. The Swiss Court gives judgment (though probably on an erroneous view of English law²) that *A* is legitimate and entitled to succeed to nine tenths of *T*'s movables. According to the law of France (*lex domicilii*), the right of succession to *T* depends on *T*'s nationality, and the Swiss judgment is conclusive. *T* leaves movables in England. An action is brought in England by *A* to have the Swiss judgment enforced, i. e., in effect, to have a judgment enforced which is held valid by the Courts of *T*'s domicile. The Swiss judgment is decisive, and is binding on the High Court.³

2. *T* dies domiciled in Portugal leaving an illegitimate son, *A*. The Portuguese Court gives judgment that *A* is entitled to part of *T*'s movables. *T* leaves movables in England. The judgment of the Portuguese Court is decisive, and binds the High Court when called upon to determine right of *A* to *T*'s movables in England.⁴

¹ *In re Trufort*, 1887, 36 Ch. D. 600, 611, judgment of *Stirling*, J. See *Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301, and as to the jurisdiction of the Courts of domicile, Rule 87, p. 398, *ante*.

² As to mistake of law, see Rule 97, p. 412, *ante*.

³ *In re Trufort*, 1887, 36 Ch. D. 600. What is really enforced is at bottom the law of *T*'s domicile, and the movables are distributed in accordance with *T*'s *lex domicilii*. See Rule 180, *post*.

⁴ *Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301.

AMERICAN NOTES.

CHAPTER XVI.

EFFECT OF FOREIGN JUDGMENTS.

IN the American decisions the term "foreign judgment" signifies either (1) a judgment of a Court of a foreign country, or (2) a judgment of a Court in a State other than that in which such judgment is sought to be enforced. In the first case, the effect to be given to the judgment depends upon general principles of law; in the second case, it depends upon general principles of law, the provisions of the Federal Constitution, and the legislation of Congress. In neither case does the foreign judgment operate directly. *Hart v. Sansom*, 110 U. S. 151; *Gratton v. Weber*, 47 Fed. Rep. 852; *Walser v. Seligman*, 21 Blatchf. C. C. 130; *Fryer v. Meyers* (Tex.), 13 So. 1025. "Judgments recovered in one State of the Union, when proved in the Courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a Court having jurisdiction of the cause and of the parties." *Hanley v. Donoghue*, 116 U. S. 1, 4; *Cole v. Cunningham*, 133 U. S. 107; 10 Sup. Ct. 269. Nevertheless, in estimating the cases decided upon state judgments, the fact should be borne in mind that such judgments have often been treated, in States other than that in which they were rendered, substantially as domestic judgments, except in respect of direct operation.

I. JUDGMENTS OF COURTS OF FOREIGN COUNTRIES.

1. RULE AS TO CONCLUSIVENESS. — In *Burnham v. Webster*, 1 Wood. & M. 172, it was held that a judgment of a Court of the province of New Brunswick was only *prima facie* evidence as between the parties to it; and a new trial was granted because the trial judge had refused to allow testimony to go to the jury impeaching the judgment for mistake and irregularity. In later decisions, however, not only upon the ground of comity, but also upon the ground that the judgment of a Court of competent jurisdiction should bind the parties to it, it has been held that such a judgment is conclusive as to the merits of the controversy, unless it can be shown that the proceeding was tainted with fraud. *McMullen v. Ritchie*, 51 Fed. Rep. 502; *Lazier v. Westcott*, 26 N. Y. 146; *Wunstan v. Higgins*, 138 N. Y. 70; *Rankin v. Goddard*, 54 Me. 28; 55 Me. 389; *Baker v. Palmer*, 83 Ill. 568; *Roth v. Roth*, 104 Ill. 35; 44 Am. Rep. 81; *Hilton v. Guyot*, 42 Fed. Rep. 249. The rule as to conclusiveness is, however, inapplicable to foreign judgments affecting matters of local policy. *Hohner v. Gratz*, 50 Fed. Rep. 369; *De Brimont v. Penniman*, 10 Blatchf. C. C. 436.

The decision in *Hilton v. Guyot*, 42 Fed. Rep. 249, was reversed by the Supreme Court of the United States, June 3, 1895, in an opinion by Mr. Justice Gray (*Fuller*, C. J., and *Harlan*, *Brewer*, and *Jackson*, JJ., dissenting), in which

it was held that the judgment, which was rendered in France, was not conclusive as to the merits of the case, but was only *primâ facie* evidence of the justice of the plaintiff's claim, such being the rule in France as to the effect of foreign judgments. *Hilton v. Guyot*, 159 U. S. 113. On the same day the Court sustained a Canadian judgment, which the defendant sought to attack on the ground that, although he had appeared in the action, he did not appear at the trial, and that the judgment was entered against him in his absence without a full examination of the merits. *Rüchle v. McMullen*, 159 U. S. 235.

2. FOREIGN JUDGMENT AS TO MOVABLES. — A foreign judgment *in rem* in respect of the title to a movable is generally conclusive. *Freeman v. Alderson*, 119 U. S. 185; *Pennoyer v. Neff*, 95 U. S. 714; *Green v. Van Buskirk*, 7 Wall. 139; *Mankin v. Chandler*, 2 Brock. 125; *State v. C. P. R. R. Co.* 10 Nev. 47; *Melhop v. Doane*, 31 Iowa, 385; *The Propeller East*, 9 Ben. 76. But the Court must have had jurisdiction of the *res*, *Noble v. Oil Co.* 79 Pa. St. 354; *Arndt v. Arndt*, 15 Ohio, 33; and there must have been judicial proceedings, with personal or public notice to parties. *Windsor v. McVeigh*, 93 U. S. 274; *China Mut. Ins. Co. v. Force*, 142 N. Y. 90.

3. FOREIGN ADMIRALTY JUDGMENTS. — Such judgments *in rem* are generally conclusive as to title. *The Rio Grande*, 23 Wall. 458; *Williams v. Armroyd*, 7 Cranch, 423; *Croudson v. Leonard*, 4 Cranch, 434; *The Garland*, 16 Fed. Rep. 283; *Street v. Insurance Co.* 12 Rich. (S. C.) 13. But it is essential that there should have been actual seizure and jurisdiction of the *res*, *Gelston v. Hoyt*, 3 Wheat. 246; that there should have been judicial proceedings, with personal or public notice, *Bradstreet v. Insurance Co.* 3 Sumn. 600; *China Mut. Ins. Co. v. Force*, 142 N. Y. 90; and that the precise question of title should have been passed upon, *The Vincennes*, 3 Ware, 171.

4. FOREIGN DIVORCE. — A divorce granted by a Jewish rabbi in Russia, in accordance with Russian law, between parties married in that country and at the time of the divorce domiciled there, is valid everywhere. *Leshinsky v. Leshinsky*, 5 Misc. 495; 25 N. Y. Supp. 841. A sentence of a Court of a foreign country, annulling a marriage between two of its subjects, who at the time of their marriage were domiciled in a State of the United States, and were validly married according to its laws, but who at the time the sentence of nullity was pronounced had returned to and were domiciled in the foreign country, must be recognised in such State as determining the status, and as terminating the marital relation, of the parties, though the ground of the sentence was that they had married without the license of their sovereign. *Roth v. Roth*, 104 Ill. 35; 44 Am. Rep. 81. But there must be a domicile in the foreign country. *St. Sure v. Lindsfelt* (Wis.), 52 N. W. 308. A decree of divorce rendered by a foreign Court against a person domiciled in New York, who was not served with process and did not appear, is inadmissible as evidence. *De Meli v. De Meli*, 120 N. Y. 485.

II. JUDGMENTS OF COURTS IN THE SEVERAL STATES.

1. AS TO VARIOUS COURTS. — "Full faith and credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records, and Proceedings shall be proved, and the effect thereof."

Constitution of the United States, Art. IV., s. 1. By s. 905 of the Revised Statutes of the United States (Acts of May 26, 1790, and March 27, 1804), which prescribes the manner of authenticating such acts, records, and judicial proceedings, it is provided that the "records and judicial proceedings" of "any State or Territory, or of any country subject to the jurisdiction of the United States," shall, if so authenticated, "have such faith and credit given to them "in every Court within the United States as they have by law or usage in the "Courts of the State from which they are taken." Under these provisions the judgment of a territorial Court is entitled to the same faith and credit as the judgment of a state Court. *Suesenbach v. Wagner*, 41 Minn. 108 ; 42 N. W. 925. And the same rule has been applied to judgments and judicial proceedings of Courts of the Cherokee Nation. *Mehlin v. Ice*, 56 Fed. Rep. 12 ; *Mackey v. Coze*, 18 How. 100. The judgments of the Courts of the United States have invariably been recognised as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the States, wherever rendered and wherever sought to be enforced. *Embry v. Palmer*, 107 U. S. 3, 10. But it has been held that the judgment of a consul of the United States in China, as to the validity of an assignment within his jurisdiction for the benefit of creditors, is not binding on the Courts of California. *Forbes v. Scannell*, 13 Cal. 242.

As to the authentication and proof of judgments, see *Carpenter v. Strange*, 141 U. S. 87 ; 11 S. Ct. 960 ; *Andrews v. Flack*, 88 Ala. 294 ; 6 So. 907 ; *Conley v. Chapman*, 74 Ga. 709 ; *Bailey v. Martin*, 119 Ind. 103 ; 21 N. E. 346 ; *Rea v. Scully*, 76 Iowa, 343 ; 41 N. W. 36 ; *Gunn v. Peakes*, 36 Minn. 177 ; 30 N. W. 466 ; *Williams v. Williams*, 53 Mo. App. 617 ; *Devorak v. More*, 25 Neb. 735 ; 41 N. W. 777 ; *Edwards v. Jones*, 113 N. C. 453 ; 18 S. E. 500 ; *Kentzler v. Kentzler*, 3 Wash. St. 166 ; 28 Pac. 370.

2. CONCLUSIVENESS OF JUDGMENTS. — The credit to be given in one State to the judgments of Courts in other States has been defined as follows : "They "are record evidence of a debt, or judgments of record, to be contested only "in such way as judgments of record may be, and consequently are conclusive "upon the defendant in every State, except for such causes as would be sufficient to set aside the judgment in the Courts of the State in which it was "rendered." *McElmoyle v. Cohen*, 13 Pet. 312, 326, cited in *Embry v. Palmer*, 107 U. S. 3, 10. They are entitled to the same credit and effect in the State in which they are sought to be enforced as they had in the State in which they were rendered. *Carpenter v. Strange*, 141 U. S. 87 ; 11 Sup. Ct. 960 ; *Hanley v. Donoghue*, 116 U. S. 1, 4 ; *Guthrie v. Lowry*, 84 Pa. St. 533 ; *Sanborn v. Perry*, 86 Wis. 361 ; 56 N. W. 337 ; *Griggs v. Becker* (Wis.), 58 N. W. 396 ; *Caughran v. Gilman*, 81 Iowa, 442 ; 46 N. W. 1005 ; *Chicago & A. Bridge Co. v. A. A. Pack. & Prov. Co.* 46 Fed. Rep. 584 ; *Edwards v. Jones*, 113 N. C. 453 ; 18 S. E. 500 ; *Lewis v. Adams*, 70 Cal. 403 ; 11 Pac. 833 ; *Wernse v. McPike*, 100 Mo. 476 ; 13 S. W. 809 ; *Dallas County v. Merrill*, 77 Mo. 573 ; *Succession of Gaines*, 45 La. An. 1237 ; 14 So. 233 ; *A. H. G. M. & M. Co. v. Andrews*, 120 N. Y. 58 ; 23 N. E. 987 ; *Walser v. Seligman*, 21 Blatchf. C. C. 130 ; *The City of New Bedford*, 20 Fed. Rep. 57 ; *Stark v. Ratcliff*, 111 Ill. 75 ; *Elsasser v. Haines*, 52 N. J. L. 10 ; 18 Atl. 1095 ; *Roach v. Privett* (Ala.), 7 So. 808 ; *Sammis v. Wightman*, 34 Fla. 10 ; *Fitzsimmons v. Johnson*, 90 Tenn. 416 ; 17 S. W. 100 ; *Packer v. Thompson*, 25 Neb. 688 ; 41 N. W. 650. See also, *Semple v. Glenn*, 91 Ala. 245 ; 9 So. 265. Hence the judgment of a

Court determining the domicile of a deceased person and probating his will, *Thomas v. Morrisett*, 76 Ga. 384; *Succession of Gaines*, 45 La. An. 1237; 14 So. 233; or of the Court of the domicile declaring a child to be lawfully adopted, is conclusive. *Van Matre v. Sankey*, 148 Ill. 356; 36 N. E. 628. So it has been held that the allowance of interest on a judgment by the Court rendering it is conclusive. *Stanton v. Welborne*, 78 Tex. 248, 251. *Contra*, *Wells, Fargo & Co. v. Davis*, 105 N. Y. 670. See *Davis v. Porter*, 51 Iowa, 254.

Where a Circuit Court of the United States in one district held a patent to be valid, and another Circuit Court in another district held it to be invalid, the latter Court refused to enjoin an alleged infringement on the strength of the decision of the former. *Pullman Co. v. Wagner Co.* 44 Fed. Rep. 764.

The constitutional provision as to full faith and credit does not apply to judgments for the enforcement of fines or penalties, *Huntington v. Attrill*, 146 U. S. 657, 672; *Hanley v. Donoghue*, 116 U. S. 1, 3; *State v. Bowen*, 20 D. C. 291; or in regard to questions of inheritance, *Morin v. St. Paul, Minneapolis & Co.* 33 Minn. 176. See also, *Hart v. Sansom*, 110 U. S. 151; *Fryer v. Meyers* (Tex.), 13 So. 1025; *Short v. Galway*, 83 Ky. 501.

The proper plea to an action on a foreign judgment is *nul tiel record*. *Marz v. Logue* (Miss.), 15 So. 890; *McElmoyle v. Cohen*, 13 Pet. 312; *Brainerd v. Fowler*, 119 Mass. 265. See *Wing v. Bradner*, 162 Pa. St. 72; 29 Atl. 291.

As to the construction of foreign judgments, see *Bank of Commerce v. Mayer*, 42 La. An. 1031; 8 So. 260; also, 35 Cent. L. J. 341.

3. JUDGMENT MUST BE FINAL. — An interlocutory decree is not entitled to the force of a judgment. *Munn v. Cook*, 24 Abb. N. C. 314, citing *Brinkley v. Brinkley*, 50 N. Y. 184. But the pendency of an appeal is no bar to an action on a judgment, unless the appeal suspends the judgment in the State in which it was rendered. *Dow v. Blake*, 148 Ill. 76; 35 N. E. 761; *Succession of Gaines*, 45 La. An. 1237; 14 So. 233. See *Freeman on Judgments*, s. 576.

4. NECESSITY OF JURISDICTION IN COURT RENDERING JUDGMENT. — The question whether the Court which rendered the judgment had jurisdiction of the parties and the subject-matter is always open to examination. In this respect, Courts in the different States are to be regarded as foreign to one another, and, if the Court was without jurisdiction, its judgment is not conclusive. *Grover & Baker Machine Co. v. Radcliffe*, 137 U. S. 287; *Noble v. Oil Co.* 79 Pa. St. 354; *Terre Haute & Ind. R. R. v. Baker*, 122 Ind. 433; 24 N. E. 83; *Kelly v. Kelly* (Mass.), 36 N. E. 837; *National Bank v. Peabody*, 55 Vt. 492; 45 Am. Rep. 632. *Contra*, *Zepp v. Hager*, 70 Ill. 223. This rule has been held to apply to a judgment rendered by a Federal Court in another State. *Insurance Co. v. Wolverton* (Tex.), 19 S. W. 614. The decision of the Supreme Court of a State on appeal, that the trial Court had jurisdiction, has been held to be conclusive. *Van Matre v. Sankey*, 148 Ill. 536; 36 N. E. 628. See *In re James' Estate*, 99 Cal. 374; 33 Pac. 1122.

The question of jurisdiction may be inquired into, notwithstanding the recital of jurisdictional facts in the record. *Grover & Baker Machine Co. v. Radcliffe*, 137 U. S. 287; *Pennoyer v. Neff*, 95 U. S. 714, 730; *Adams v. Adams*, 154 Mass. 290; 28 N. E. 260; *Price v. Harrell*, 161 Pa. St. 530; 29 Atl. 279; *Guthrie v. Lowry*, 84 Atl. 533; *In re James' Estate*, 99 Cal. 374; 33 Pac. 1122; *Aultman, Miller & Co. v. Mills* (Wash.), 36 Pac. 1046, citing *Ritchie v. Carpenter*, 2 Wash. St. 512; 28 Pac. 380. *Contra*, *Zepp v. Hager*, 70 Ill. 223.

5. JURISDICTION IN PROCEEDINGS *in personam*. — It is essential to jurisdiction, and hence to the validity of judgments, in actions *in personam*, that the defendant should have been served with process within the territory, or have voluntarily appeared. *Pennoyer v. Neff*, 95 U. S. 714; *Hart v. Sansom*, 110 U. S. 151; *Pana v. Bowler*, 107 U. S. 529; *Reynolds v. Stockton*, 140 U. S. 254; 11 S. Ct. 773; *Noble v. Union River Logging Railroad*, 147 U. S. 173; *First Nat. Bank v. Cunningham*, 48 Fed. Rep. 510; *Rand v. Hanson*, 154 Mass. 87; *Stone v. Wainwright*, 147 Mass. 201; *Rothrock v. Insurance Co. (Mass.)* 37 N. E. 206; *McVicker v. Reedy*, 31 Me. 314; *National Bank v. Peabody*, 55 Vt. 492; 45 Am. Rep. 632; *Whittier v. Wendell*, 7 N. H. 257; *Renier v. Hurlbut (Wis.)*, 50 N. W. 783; *Jones v. Spencer*, 15 Wis. 583; *Reed v. Chilson*, 142 N. Y. 152; 36 N. E. 884; *N. Y. L. Ins. Co. v. Aikin*, 125 N. Y. 660; 26 N. E. 732; *De Meli v. De Meli*, 120 N. Y. 485; *People v. Baker*, 76 N. Y. 78; *Martin v. Cent. Vt. R. R.* 50 Hun, 347; 3 N. Y. Supp. 82; *Insurance Co. v. Wolvorton (Tex.)*, 19 S. W. 614; *Scott v. Noble*, 72 Pa. St. 115 (holding extra-territorial acceptance of service void); *Price v. Harrell*, 161 Pa. St. 530; 29 Atl. 279; *Home Friendly Soc. v. Tyler*, 2 Pa. Dist. 693; *Grover & Baker Co. v. Radcliffe*, 66 Md. 611; *Frothingham v. Barnes*, 9 R. I. 474; *Winn v. Strickland*, 34 Fla. 610; *Sammis v. Wightman*, 31 Fla. 10; 12 So. 526; *Wood v. Watkinson*, 17 Conn. 500; *Reed v. Reed*, 52 Mich. 117; *McEwen v. Zimmer*, 38 Mich. 765; *Arndt v. Arndt*, 15 Ohio, 33; *Williams v. Preston*, 3 J. J. Marsh. 600; *Miller v. Miller*, 1 Bailey (S. C.), 242; *Tillinghast v. Boston Co.* 39 S. C. 484; 18 S. E. 120; *Nicholas v. Farwell*, 24 Neb. 186; *Davidson v. Sharpe*, 6 Ired. L. 14; *Barlow v. Steel*, 65 Mo. 611; *Crumlish v. Central Imp. Co.* 38 W. Va. 390; 18 S. E. 456. This rule does not apply to a judgment on a writ of error, where the defendant appeared in the Court below. *Fitzsimmons v. Johnson*, 90 Tenn. 416; 17 S. W. 100; nor to a judgment founded on a recognisance, after two successive returns of "nil habet" on successive writs of *sc. fa.* *Elsasser v. Haines*, 52 N. J. L. 10. It applies to judgments against corporations. *Rothrock v. Dwelling-house Ins. Co. (Mass.)* 37 N. E. 206; *Remington v. Samana Bay Co.* 140 Mass. 494; *Phillips v. Burlington Library Co. (Pa.)* 21 Atl. 640; 28 W. N. C. 21; *Clews v. Woodstock Iron Co.* 44 Fed. Rep. 31; *Reifsmider v. Am. Imp. Pub. Co.* 45 Fed. Rep. 433. But a State may require a corporation, or a non-resident entering into a partnership or association within its limits, or making contracts enforceable therein, to appoint some one to receive service of process. *Pennoyer v. Neff*, 95 U. S. 714, 735.

6. JURISDICTION IN PROCEEDINGS *quasi in rem*. — The jurisdictional requirement of personal service applies to judgments *quasi in rem*, in proceedings having for their sole object the sale or other disposition of property of defendant to satisfy demands of the plaintiff. In such cases a judgment rendered without personal service is ineffective to determine the validity of any demand beyond that which is satisfied by the property. *Freeman v. Alderson*, 119 U. S. 185; *Jones v. Spencer*, 15 Wis. 583; *National Bank v. Peabody*, 75 Vt. 492; and the judgment is wholly void, if the Court had no jurisdiction of the property. *Noble v. Oil Co.* 79 Pa. St. 354.

7. JUDGMENTS BY CONFESSION. — A judgment by confession, if valid in the State in which it was entered, will be recognised in another State, though such a judgment is not authorised by the laws of the latter. *Kingman v. Paulson*, 126 Ind. 507; *Ritter v. Hoffman*, 35 Kan. 215; *Crafts v. Clark*, 38 Iowa, 237;

Teel v. Yost, 128 N. Y. 387. But the authority to confess judgment must be strictly executed, *Grover & Baker Machine Co. v. Radcliffe*, 66 Md. 511; proof may be required that the judgment was lawful, *Crafts v. Clark*, 31 Iowa, 77; *Sherwood v. Miller*, 37 Mo. App. 48; *Thomas v. Pendleton* (S. Dak.), 46 N. W. 180; and the judgment may be impeached on the ground that the note on which it was entered was fraudulently obtained by duress and without consideration. *Trebilcox v. McAlpine*, 62 Hun, 317, distinguishing *Teel v. Yost*, *supra*.

8. JUDGMENTS AGAINST JOINT DEFENDANTS. — A judgment rendered against joint defendants, only one of whom was served with process or appeared, will sustain an action in another State against such defendant, but not against a defendant who was not served with process and who did not appear. *Hanley v. Donoghue*, 116 U. S. 1, 3; *Renaud v. Abbott*, 116 U. S. 277; *Comley v. Chapman*, 74 Ga. 709; *Wilbur v. Abbott*, 60 N. H. 40; *Hoffman v. Newell*, 20 N. Y. Supp. 432; 21 N. Y. Supp. 912; *Holt v. Johnson*, 50 Mo. App. 373. Such a judgment against partners, of whom one (a non-resident) was not served with process, may bind the firm assets, but not the absent partner's personal property. *Sugg v. Thornton*, 132 U. S. 524; *Sanger v. Overmier*, 64 Tex. 57.

9. PRESUMPTION AS TO JURISDICTION. — In the absence of proof to the contrary, a Court of general jurisdiction is presumed to have had jurisdiction of the action in which its judgment was rendered. *Applegate v. Lexington &c. Mining Co.* 117 U. S. 255; *Hanley v. Donoghue*, 116 U. S. 1, 5; *Knowlton v. Knowlton* (Ill.), 39 N. E. 594; *Van Matre v. Sankey*, 148 Ill. 536; 36 N. E. 628; *Lynde v. Columbus &c. Co.* 57 Fed. Rep. 993; *Bailey v. Martin*, 119 Ind. 103; 21 N. E. 346; *Gilchrist v. O. & L. L. Co.* 21 W. Va. 115; *Gunn v. Peakes*, 36 Minn. 177; 30 N. W. 466; *Nicholas v. Farwell*, 24 Neb. 180; *Rand v. Hanson*, 154 Mass. 87; *Caughran v. Gilman*, 81 Iowa, 442; 46 N. W. 1005; *Hallum v. Dickinson*, 54 Ark. 311; 15 S. W. 775; *Henry v. Allen*, 82 Tex. 35; *Bogan v. Hamilton*, 90 Ala. 454; 8 So. 186; *Home Friendly Soc. v. Tyler*, 2 Pa. Dist. 693. But if the proceeding was special or statutory, and not according to the common law, or in an inferior Court, jurisdiction will not be presumed merely from the fact that the Court assumed to exercise it. *Kelly v. Kelly*, 161 Mass. 111; 36 N. E. 837; *Louisville, N. A. & C. Ry. Co. v. Parish* (Ind.), 33 N. E. 122.

10. ILLEGAL JUDGMENTS. — A judgment of a state Court may be treated as invalid because it was rendered in violation of law. *In re Hong Yen Chang*, 84 Cal. 163, in which the Supreme Court of California refused to recognise a certificate of naturalization of a Chinaman issued by the Court of Common Pleas of New York city. So, also, such a judgment may be treated as invalid when it is in no way responsive to the issues, though the defendant appeared and answered the complaint, but took no part in the subsequent litigation. *Reynolds v. Stockton*, 140 U. S. 254; 11 S. Ct. 773.

11. IMPEACHMENT OF JUDGMENT FOR FRAUD. — A judgment obtained in one State cannot be attacked in another State, on the ground of mistake or misrepresentation, of collusion between parties, of false testimony, or, generally, on the ground that it was obtained by fraud, *Hanley v. Donoghue*, 116 U. S. 1, 4; *Dow v. Blake*, 148 Ill. 76; 35 N. E. 761; *Mooney v. Hinds*, 160 Mass. 469; 36 N. E. 484; *Barras v. Bidwell*, 3 Woods C. C. 5; *Metcalf v.*

Gilmore, 59 N. H. 417; 47 Am. Rep. 217; unless the fraud was in the action of the Court, *Ambler v. Whipple* (Ill.), 28 N. E. 841; or was of such a character as to prevent a party from exhibiting his case. *White v. Reid*, 70 Hun, 197; 24 N. Y. Supp. 290 (citing *Mayor v. Brady*, 115 N. Y. 617; 22 N. E. 237, and *U. S. v. Throckmorton*, 98 U. S. 61); *Sayre v. Harpold*, 33 W. Va. 553, 557; 11 S. E. 16.

12. JUDGMENT AS A BAR. — As to how far a judgment in one State will bar proceedings on the same cause of action in another State, the decisions are conflicting. *Connor v. Hanover Ins. Co.* 28 Fed. Rep. 549. It has been held to be a bar in *Henderson v. Staniford*, 105 Mass. 504; *Nelson's Admr. v. R. R. Co.* (Va.) 14 S. E. 838. It may be pleaded in bar *puis darrein continuance*. *Memphis & Charleston R. R. Co. v. Grayson*, 88 Ala. 572; 7 So. 122; *Baxley v. Linah*, 16 Pa. St. 214; *Paine v. Ins. Co.* 11 R. I. 411; *North Bank v. Brown*, 50 Me. 241. See, as to the foreclosure of a mortgage on a railroad situated partly in two States, *Lynde v. Columbus &c. Co.* 57 Fed. Rep. 993, following *Farmer's Loan & Trust Co. v. Postal Tel. Co.* 55 Conn. 334; 11 Atl. 184, and distinguishing *Muller v. Dows*, 94 U. S. 444. As to the right to arrest a defendant under the Code of Civil Procedure of New York for a cause of action on which judgment has been rendered in another State, see *Baxter v. Drake*, 85 N. Y. 502; *Leach v. Linde*, 73 Hun, 246; 25 N. Y. Supp. 1042; *Pitt v. Freed*, 28 N. Y. Supp. 863. A judgment rendered without jurisdiction does not operate as a bar. *Stone v. Wainwright*, 147 Mass. 201; *Martin v. Cent. Vt. R. R.* 50 Hun, 347; 3 N. Y. Supp. 82.

The mere pendency of a suit in one State is no bar to an action on the same subject in another State. *Douglas v. P. Ins. Co.* 138 N. Y. 209; 33 N. E. 938; *Hospes v. O'Brien*, 24 Fed. Rep. 145; *Davis v. Morris*, 76 Va. 21; *Barbe v. Glick*, 20 Ill. App. 408.

13. DIVORCE DECREES. — Where the Court decreeing the divorce had jurisdiction, its sentence is recognised in other States as conclusive. *Shaw v. Shaw*, 98 Mass. 158; *In re James' Estate*, 99 Cal. 374; 33 Pac. 1122; *James v. James*, 81 Tex. 373; *Hawkins v. Ragsdale*, 80 Ky. 353; 44 Am. Rep. 483; *Knowlton v. Knowlton* (Ill.), 39 N. E. 594; *Johnson v. Johnson*, 67 How. Pr. 144; *People v. Allen*, 40 Hun, 611. Jurisdiction is presumed. *Knowlton v. Knowlton* (Ill.), 39 N. E. 594; *James v. James*, 81 Tex. 373; *Miller v. Leach*, 95 N. C. 229; *Waldo v. Waldo*, 52 Mich. 94; *Gunn v. Peakes*, 36 Minn. 177. *Contra*, *Kelley v. Kelley*, 161 Mass. 111; 36 N. E. 837. But it may be impeached, either upon the face of the record, *Morey v. Morey*, 27 Minn. 265; *Werner v. Werner*, 30 Ill. App. 159; *Collins v. Collins*, 80 N. Y. 1; or by proof of facts against the recitals of the record, *Adams v. Adams*, 154 Mass. 290; *Reed v. Reed*, 52 Mich. 117. See 2 *Bishop on Marriage, Divorce, and Separation*, s. 183, and cases cited.

It is conceded to be essential to jurisdiction that at least one of the parties to the divorce should be domiciled within the State. *Sewall v. Sewall*, 122 Mass. 156; *Gregory v. Gregory*, 78 Me. 187; 57 Am. Rep. 792; *Reed v. Reed*, 52 Mich. 117; *People v. Dawell*, 25 Mich. 247; *Watkins v. Watkins*, 125 Ind. 163; 25 N. E. 175; *State v. Armington*, 25 Minn. 29; *Van Fossen v. State*, 37 Ohio St. 317; 41 Am. Rep. 507; *Straß v. Straß*, 3 McArthur, 415; *Morgan v. Morgan*, 1 Tex. Civ. App. 315; 21 S. W. 154; *Smith v. Smith*, 19 Neb. 706.

Whether a decree of divorce on substituted or constructive service, by pub-

lication or otherwise, against a person who was not served with process within the State and did not appear, is valid as between the States, is a question upon which opinions and decisions differ. Where both parties were domiciled within the State, the decree possesses interstate validity. *Hood v. Hood*, 11 Allen, 196; *Hood v. Hood*, 110 Mass. 463; *Burlen v. Shannon*, 115 Mass. 438; *Loker v. Gerald*, 157 Mass. 42; 31 N. E. 709; *Hunt v. Hunt*, 72 N. Y. 217. If only one of the parties was domiciled within the State, the decree is recognised as determining the status of such party. *Cheever v. Wilson*, 9 Wall. 108; *Pennoyer v. Neff*, 95 U. S. 714, 734, 735; *Adams v. Adams*, 154 Mass. 290; 28 N. E. 260; *Shafer v. Bushell*, 24 Wis. 372; *In re Feyh's Estate*, 5 N. Y. Supp. 90. *Bishop, Mar., Div., and Separation*, vol. ii., ss. 153-158, 185, strongly maintains that, this consequence being conceded, the decree should in such case everywhere be admitted to dissolve the marriage as to both parties, as there cannot be a husband without a wife, or *vice versa*. *Wharton, Conf. of L.* s. 237, suggests that "the only safe course is to view foreign divorces, based on mere publication, as having no extra-territorial effect as to a defendant domiciled "in another jurisdiction, unless there be satisfactory proof that the whereabouts of such defendant, after diligent search, could not be discovered." As admitting the decree to be extra-territorially operative, see *Knowlton v. Knowlton* (Ill.), 39 N. E. 549; *Chapman v. Chapman* (Kan.), 29 Pac. 1071; *Anthony v. Rice*, 110 Mo. 233; *Thompson v. Thompson*, 91 Ala. 591; *Smith v. Smith*, 43 La. An. 1140; 10 So. 248; *Harding v. Alden*, 9 Me. *140; *Van Orsdal v. Van Orsdal*, 67 Iowa, 35. *Contra*, *Flower v. Flower*, 42 N. J. Eq. 152; *Cook v. Cook*, 56 Wis. 195; 43 Am. Rep. 706; *Doerr v. Forsythe*, 50 Ohio St. 726; 35 N. E. 1055; *Van Inwagen v. Van Inwagen*, 86 Mich. 333; 49 N. W. 154; *Philadelphia v. Wetherby*, 15 Phila. 403; *Commonwealth v. Shuler*, 2 Pa. Dist. 552; *Commonwealth v. Steiger*, 2 Pa. Dist. 493; 12 Pa. Co. Ct. 334; *Williams v. Williams*, 130 N. Y. 193; 29 N. E. 98; *Jones v. Jones*, 108 N. Y. 415; *O'Dea v. O'Dea*, 101 N. Y. 23; *People v. Baker*, 76 N. Y. 78; *Munson v. Munson*, 14 N. Y. Supp. 692; *Matter of House*, 3 Con. Sur. 524; 14 N. Y. Supp. 275; *Davis v. Davis*, 2 Misc. 549; 22 N. Y. Supp. 191, in which *Pryor, J.*, referring to the decisions of the Court of Appeals, said: "To this conclusion I am compelled; but I am not forbidden to say that my reason revolts against it." But in *Jones v. Jones*, *supra*, the Court held that a defendant, in going into another State and filing an answer, was bound by the effect given to his action by the statutes of such State. In *Cumington v. Belchertown*, 149 Mass. 223; 21 N. E. 435, it was held that the decree of a New York Court, annulling the marriage in Massachusetts of a woman who remained there, and had never been within the jurisdiction of the New York Court, for a cause for which the marriage could not have been avoided in Massachusetts, was invalid in the latter State; but the general question as to the effect in divorce of notice by publication was not determined. *Loker v. Gerald*, 157 Mass. 42; 31 N. E. 709. See also, observations in *Adams v. Adams*, 154 Mass. 290; 28 N. E. 260. In Massachusetts, if a person goes to another State for the purpose of procuring a divorce for a cause occurring in Massachusetts, or not warranting a divorce in the latter State, the divorce so procured is treated as invalid. *Sewall v. Sewall*, 122 Mass. 156. Where a husband obtained a divorce in Maine, and the wife appeared, and, after the decree, executed a release discharging him and his estate from all claims, and it was not shown that the husband went to Maine for the purpose of procuring a divorce in violation of the Massachusetts statute, the wife was not permitted to impeach the

decree. *Loud v. Loud*, 129 Mass. 14. See also, *Burlen v. Shannon*, 115 Mass. 438. In Maine, where the provisions of the Massachusetts statute have been adopted, it has been held that they do not apply to the case of one who acquires a *bonâ fide* domicile elsewhere. *Gregory v. Gregory*, 76 Me. 535. In California it has been held that a divorce obtained in another State, upon the appearance of an attorney, without the knowledge or consent of the defendant, is at most avoidable at the latter's election, and cannot be impeached in California by the plaintiff, at whose instance the appearance was entered. *Elliot v. Wohlfrom*, 55 Cal. 384. It has been held in Iowa that a decree of divorce obtained in Wisconsin, on service by publication, is ineffectual to award the custody of minor children in Iowa. *Kline v. Kline*, 57 Iowa, 386; 42 Am. Rep. 47. In any case the provisions as to publication must be strictly followed. *Cheely v. Clayton*, 110 U. S. 701; *Morey v. Morey*, 27 Minn. 265.

Personal disabilities imposed by a decree of divorce, such as the disqualification of the guilty party to marry again, being penal in their nature, have no extra-territorial operation. *Huntington v. Attrill*, 146 U. S. 657, 673; *Roberts v. Ogdensburgh &c. R. R. Co.* 34 Hun, 324; *Stack v. Stack*, 6 Demarest, 280, citing *Van Voorhis v. Brintnall*, 86 N. Y. 18; *Thorp v. Thorp*, 90 N. Y. 602; *Moore v. Hegerman*, 92 N. Y. 521; *Van Storch v. Griffin*, 71 Pa. St. 240; *Dickinson v. Dickinson*, 1 Yerger (Tenn.), 110. In *Garner v. Garner*, 56 Md. 127, the Court modified a decree of divorce against a non-resident, who had not (apparently) been served with process within the State, by striking out the part imposing on the defendant disability to marry again, on the ground that that part of the decree was in the nature of a judgment *in personam*.

A decree for alimony granted in one State may be enforced in another. *Dow v. Blake*, 148 Ill. 76; 35 N. E. 761; *Bullock v. Bullock* (N. J. Eq.), 27 Atl. 435; *Stewart v. Stewart*, 27 W. Va. 167.

CHAPTER XVII.
EFFECT IN ENGLAND OF
FOREIGN BANKRUPTCY;
FOREIGN GRANT OF ADMINISTRATION.

(A) FOREIGN BANKRUPTCY.

I. AS AN ASSIGNMENT.

Bankruptcy in Ireland¹ or Scotland.²

RULE 106. — An assignment of a bankrupt's property to the representative of his creditors ³ —

(1) under the Irish Bankrupt and Insolvent Act, 1857 ⁴ (Irish Bankruptcy), or

(2) under the Bankruptcy (Scotland) Act, 1856 ⁵ (Scotch Bankruptcy),

is, or operates as, an assignment to such representative of the bankrupt's

(i) immovables (land),

(ii) movables,

wherever situate.

Comment.

As to immovables. — An Irish or Scotch bankruptcy passes to the creditor's representative (conveniently described as the trustee) immovables of the bankrupt situate in any part of the British dominions. Thus it passes to the trustee lands, *e. g.*, in Ireland, Scotland, England, the Isle of Man, or Victoria. It probably also passes to the trustee immovables of the bankrupt situate in

¹ See the Irish Bankrupt and Insolvent Act, 1857, 20 & 21 Vict. c. 60.

² See the Bankruptcy (Scotland) Act, 1856, 19 & 20 Vict. c. 79.

³ In Ireland the "assignees," in Scotland the "trustee."

⁴ See 20 & 21 Vict. c. 60, ss. 267, 268.

⁵ See 19 & 20 Vict. c. 79, s. 102, with which compare s. 42.

a country, *e. g.*, Italy, which does not form part of the British dominion, but passes such immovables so far, and in so far only, as the Italian Courts recognise the title of the Irish or Scotch trustee.

As to movables. — An Irish or Scotch bankruptcy is an assignment to the trustee of the movables, *e. g.*, goods, of the bankrupt, situate in any part of the British dominions, and also in so far as Courts acting under the authority of the British Crown can determine the matter, of movables situate in countries not forming part of the British dominions.

Speaking generally, the statements made in the comment on Rule 66,¹ with regard to the extra-territorial effect of an English bankruptcy as an assignment, apply with the necessary alterations to the extra-territorial effect of an Irish or a Scotch bankruptcy as an assignment.

Bankruptcy² in any Foreign Country except Ireland or Scotland.

RULE 107. — An assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country not forming part of the United Kingdom,³ is not, and does not operate as, an assignment of any immovables of the bankrupt situate in England.

Comment.

No assignment of a bankrupt's property under the bankruptcy law of a foreign country, unless the bankruptcy takes place, as does a Scotch or Irish bankruptcy, under an Act of the Imperial Parliament, operates as an assignment of the bankrupt's immovables, *e. g.*, lands or houses in England, or, indeed, has any effect upon the title to them.

It may, indeed, be laid down in broad terms that, according to the doctrine maintained by English Courts, a bankruptcy in one country has no effect as an assignment or otherwise (except, of

¹ See p. 333, *ante*.

² The word "bankruptcy," as applied to a foreign country, is here used in its very widest sense, and includes any proceeding, whatever its name, by which, under the authority of a Court, the property of an insolvent debtor is distributed among his creditors; a bankruptcy in this wide sense is sometimes described as any "process of divestiture and concurrence of creditors." See *Goudy, Law of Bankruptcy in Scotland*, 2nd ed., p. 631.

³ For definition of "United Kingdom," see p. 65, *ante*.

course, where the bankruptcy takes place under an Act of Parliament) on land in another country.¹ But this statement is a little broader than the facts warrant. There is no reason to suppose that English Courts would decline to recognise the extra-territorial effect, as an assignment, of a bankruptcy in one country, *e. g.*, Victoria, on land of the bankrupt in another country, *e. g.*, New Zealand, which was given to a Victorian bankruptcy by the *lex situs*, *i. e.*, by an Act of the New Zealand legislature.²

RULE 108.³ — An assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country where the bankrupt is domiciled, is, or operates as, an assignment of the movables of the bankrupt situate in England (?).

Comment.

The general principle of English law seems to be that bankruptcy, or any proceeding in the nature of bankruptcy, in a foreign country where the bankrupt is domiciled, is an assignment to the trustees, assignees, curators, syndics, or others, who under the law of that country are entitled to administer his property, of all his movables, or, in other words, of his chattels personal and choses in action in England,⁴ and, it would seem, as far as English Courts can deal with the matter, of his movables situate in any other country.

Though, however, the adoption of this principle by English Courts is on the whole pretty well established, no reported case decisively determines the extent to which English judges attribute extra-territorial operation to a bankruptcy in the country where the bankrupt is domiciled.⁵

The effect in England of an assignment of a debtor's property, under the bankruptcy law of the country where he is domiciled, is subject to certain limitations.

¹ *Cockerell v. Dickens*, 1840, 3 Moore P. C. 98.

² Nor would such an Act in any way exceed the authority of the New Zealand Parliament.

³ *Jollet v. Deponthieu*, 1769, 1 H. Bl. 132 (n); *Sill v. Worswick*, 1791, 1 H. Bl. 665; *Royal Bank of Scotland v. Cuthbert Stein's Case*, 1813, 1 Rose, 462; *Selkrig v. Davis*, 1814, 2 Rose, 97, 291; *In re Artola Hermanos*, 1890, 24 Q. B. D. (C. A.) 640.

⁴ See especially, *Westlake*, p. 152.

⁵ See *In re Artola Hermanos*, 1890, 24 Q. B. D. (C. A.) 640, 644, 645, judgment of Coleridge, C. J., and pp. 648, 650, judgment of Fry, L. J.

First. The assignment has not a greater effect, extra-territorially, than it has in the country where a bankruptcy takes place. Hence it operates in England as an assignment of such movable property only as, had it been situate in the foreign country, would have passed to the representative of the creditors and formed part of the fund to be administered for their benefit.

Secondly. Whether property in England is to be brought under the head of movables or immovables must be determined by the law of England (*lex situs*), and no property passes under our Rule to the representative of the creditors under a foreign bankruptcy which is not considered as movables (*mobilia*) by the law of England. Thus heirlooms, title-deeds, and other things held by English law to be immovables, would not, if situate in England, pass under their owner's bankruptcy at New York to the American assignee.¹

Thirdly. What may be the effect of a foreign bankruptcy under the law of a debtor's domicile, as an assignment of his movable property in England, is a different question from the inquiry whether the High Court has jurisdiction to make bankrupt a debtor already made bankrupt in the country where he is domiciled? That the English Courts have jurisdiction, irrespective of the debtor's domicile, in all cases where jurisdiction is given them by the Bankruptcy Act, 1883,² is certain.³

Illustration.

Debtor domiciled at Amsterdam stopped payment there on the 18th December, 1759. On the 1st January, 1760, the proper Court at Amsterdam took cognizance of the stoppage of payment. On the 2nd he was declared bankrupt at Amsterdam, and a curator or assignee of his property appointed. On the 20th December, 1759, *X*, a creditor of the bankrupt, made an affidavit in the Mayor's Court of London, and attached £1,200 in the hands of *M*, who was indebted to the bankrupt to that amount. On the 8th March, 1760, *X* obtained judgment and issued execution against *M*, who, being unable to pay £1,200, gave *X* a note for the amount, payable in a month. On the 12th March, *A*, the

¹ See chap. xxi., Rule 137, p. 513, *post*.

² See Rules 55, 56, pp. 294, 297, *ante*.

³ See *In re Artola Hermanos*, 1890, 24 Q. B. D. (C. A.) 640, 643, 644, judgment of Coleridge, C. J.; *Nelson*, p. 170; *Ex parte McCulloch*, 1880, 14 Ch. D. (C. A.) 716; *Ex parte Robinson*, 1883, 22 Ch. D. (C. A.) 816.

Dutch assignee, claimed the £1,200. It was held that *A* was entitled to the money as against *X*, the attaching creditor.¹

RULE 109.²—Subject to the effect of Rule 106,³ an assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country where the bankrupt is not domiciled, does not operate as an assignment of the movables of the bankrupt situate in England.

Comment.

This Rule is, on the whole, in harmony with the general current of English decisions, but its correctness is not absolutely free from doubt.⁴

Illustration.

A debtor is made bankrupt in France, where he is not domiciled. The bankruptcy is not an assignment of his movables in England to the representative of the creditors under the French bankruptcy, nor is it a reason for staying bankruptcy proceedings against the debtor in England.⁵

English and Foreign Bankruptcy.

RULE 110.⁶—Where a debtor has been made bankrupt

¹ *Solomons v. Ross*, 1764, 1 H. Bl. 131 (n). In this case it may, I conceive, be assumed that the bankrupt was domiciled at Amsterdam. See also, *Jollet v. Deponthieu*, 1769, 1 H. Bl. 132 (n).

² *In re Artola Hermanos*, 1890, 24 Q. B. D. (C. A.) 640.

³ *I. e.*, the Rule as to the effect of an Irish or Scotch bankruptcy.

⁴ See *In re Davidson's Trusts*, 1873, L. R. 15 Eq. 383, and contrast *In re Blüthman*, 1856, L. R. 2 Eq. 23. "It is submitted," writes Mr. Foote, "that as the English bankrupt law does not require an English domicile to found its jurisdiction, so it should recognise foreign insolvencies and bankruptcies without inquiring whether the subject of them was or was not domiciled in the country where his bankruptcy or insolvency was declared." *Foote*, p. 309. See generally, as to foreign bankruptcy, *In re Levy's Trusts*, 1885, 30 Ch. D. 119; *In re Aylwin's Trusts*, 1873, L. R. 16 Eq. 585.

⁵ *In re Artola Hermanos*, 1890, 24 Q. B. D. (C. A.) 640.

⁶ *Geddes v. Mowat*, 1824, 1 Gl. & J. 414. Compare *Ex parte McCulloch*, 1880, 14 Ch. D. (C. A.) 716, and *Ex parte Robinson*, 1883, 22 Ch. D. (C. A.) 816. See the Bankruptcy Act, 1883 (46 & 47 Vict. cap. 52), s. 14, as to power of Court to deal with case where receiving order has been made by Court against debtor whose estate ought to be distributed under Irish or Scotch bankruptcy law. See *Baldwin*, 4th ed., p. 73.

in more countries than one, and, under the bankruptcy law of each of such countries, there has been an assignment of the bankrupt's property, which might, under any of the foregoing Rules,¹ operate as an assignment of his property in England, effect will be given in England to that assignment which is earliest in date.

Comment.

First. This Rule holds good when the earliest of several bankruptcies takes place within the United Kingdom.

On the 1st of January a debtor is adjudicated bankrupt in Ireland, and his property thereupon passes, or is assigned, to the Irish assignees, and this whether his property is situate in Ireland or in England. On the 2nd of January he is adjudicated bankrupt in England, and his property (if any) passes or is assigned to the English trustee, but it is in reality the assignment under the Irish bankruptcy which operates in England; for by the 2nd of January the immovables or movables, which were the property of the bankrupt on the 31st of December, have on the 1st of January ceased to belong to him, and been vested in the Irish assignees. These immovables or movables, therefore, cannot on the 2nd of January pass to the English trustee as property of the bankrupt.²

Secondly. The Rule probably holds good where the earliest of several bankruptcies, and the assignment under it, takes place in a country beyond the limits of the United Kingdom, *e. g.*, Victoria or Prussia.

¹ See Rule 66, p. 333, *ante*; Rules 106–109, pp. 442–446, *ante*.

² Priority, for the purpose of this Rule, depends on the date of the assignment, and not on the date of the commission of the act of bankruptcy. See *Geddes v. Mowat*, 1824, 1 Gl. & J. 414. It should be noted that, as regards a Scotch bankruptcy, though it is the act and warrant of confirmation which vests the bankrupt's property in the trustee, it is then vested as at the date of the sequestration. See 19 & 20 Vict. cap. 79, s. 102 and s. 42. In considering, therefore, whether an assignment under an English bankruptcy or an assignment under a Scotch bankruptcy is the earlier, the date to be looked at is the date of the adjudication (see the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 54) in the one case and of the sequestration in the other.

II. AS A DISCHARGE.¹

RULE 111.²—A discharge under the bankruptcy law of any country from any debt or liability is in such country a discharge from such debt or liability, wherever it has been contracted or has arisen.

Comment.

The principle of this Rule is that a discharge from a debt under the bankruptcy law of any country is presumably intended to free him from the debt, whether incurred in that country or elsewhere.

"A foreign certificate," says Pollock, C. B., [may be³] "no answer to a demand in our Courts; but an English certificate is surely a discharge as against all the world in the English Courts. The goods of the bankrupt all over the world are vested⁴ in the assignees; and it would be a manifest injustice to take the property of a bankrupt in a foreign country, and then to allow a foreign creditor to come and sue him here."⁵

These words refer to the effect of a discharge under an English bankruptcy, and it is only to such a discharge that our Rule can from its nature be applied by English Courts; but the principle embodied in the Rule, and expressed in the words of Pollock, C. B., is accepted by English judges as determining the effect in a foreign country, in so far as the matter can come before them for consideration, of a discharge under a bankruptcy in such country.⁶

Illustrations.

1. *X*, a Frenchman, becomes indebted in France to another Frenchman, *A*. *X* becomes bankrupt and obtains his discharge in England. The discharge is in England an answer to an action for the debt by *A* against *X*.⁷

¹ *Story*, ss. 331-340; *Westlake*, pp. 281-283; *Foote*, pp. 458-465; *Nelson*, pp. 171, 172. See Rule 67, p. 343, *ante*.

² *Armani v. Castrique*, 1844, 13 M. & W. 443, 447, dictum of Pollock, C. B.; *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 234, 235, *per Curiam*.

³ Compare Rules 112-114, pp. 449-454, *post*.

⁴ *I. e.*, as far as can be effected by English law. For the effect of an English bankruptcy as an assignment, see Rule 66, p. 333, *ante*.

⁵ *Armani v. Castrique*, 1844, 13 M. & W. 443, 447, *per Pollock*, C. B.

⁶ Compare *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 234, 235.

⁷ *Armani v. Castrique*, 1844, 13 M. & W. 443.

2. *X*, an Englishman, becomes indebted in England to another Englishman, *A*. *X* becomes bankrupt and obtains his discharge in Victoria. The discharge is in Victoria an answer to an action for the debt by *A* against *X*.¹

RULE 112.²—A discharge from any debt or liability under the bankruptcy law of the country where the debt or liability has been contracted or has arisen [or perhaps where it is to be paid or satisfied?] is a discharge therefrom in England.³

Comment.

This Rule is well established, but there is some little doubt as to its exact extent.

The discharge of a debt (including in that term any other obligation to pay money arising from a contract) under the bankruptcy law of the country where the debt is incurred (*lex loci contractus*) is a valid discharge in England.

"The rule," says Lord Ellenborough, "was well laid down by Lord Mansfield, in *Ballantine v. Golding*, that what is a discharge of a debt in the country where it was contracted is a discharge of it everywhere."⁴

"The rule adopted," says Cockburn, C. J., "by Lord Ellenborough, in *Potter v. Brown*,⁵ after the cases of *Ballantine v. Golding*⁶ and *Hunter v. Potts*,⁷ . . . applies to a discharge by a Court in a foreign country; à fortiori, it applies to a discharge by a Court in one of the British colonies."⁸

"There is no doubt," it has been laid down,⁹ "that a debt or

¹ Compare *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 234, 235.

² *Potter v. Brown*, 1804, 5 East, 124; *Gardiner v. Houghton*, 1862, 2 B. & S. 743; *Quelin v. Moisson*, 1827, 1 Knapp P. C. 265 (n); *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 234, judgment of Bovill, C. J.; *Bartley v. Hodges*, 1861, 1 B. & S. 375; 30 L. J. Q. B. 352; *Phillips v. Eyre*, 1870, L. R. 6 Q. B. 1, 28; *Gibbs v. Société Industrielle*, 1890, 25 Q. B. D. (C. A.), 399.

³ As all the Rules in this Digest are rules of English law, the words "in England" are not strictly necessary, but are here inserted to prevent misunderstanding.

⁴ *Potter v. Brown*, 1804, 5 East, 124, 130; 7 R. R. 663, 667, judgment of Ellenborough, C. J.

⁵ *Ibid.*

⁶ *Cook, Bk. Law*, 8th ed., 487.

⁷ 4 T. R. 182.

⁸ *Gardiner v. Houghton*, 1862, 2 B. & S. 743, 748, per Cockburn, C. J.

⁹ *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 234, judgment of Court delivered by Bovill, C. J.

"liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the Courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries. It was laid down by Lord King, in *Burrows v. Jemino*;¹ by Lord Mansfield, in *Ballantine v. Golding*;² by Lord Ellenborough, in *Potter v. Brown*;³ by the Privy Council, in *Odwin v. Forbes*;⁴ and in *Quelin v. Moisson*;⁵ and by the Court of Queen's Bench in the case of *Gardiner v. Houghton*;⁶ and by the Court of Exchequer Chamber, in the elaborate judgment delivered by my brother Willes, in *Phillips v. Eyre*."⁷

This principle certainly applies to a debt payable in the country where it is incurred, and probably applies to a debt incurred in one country, *e. g.*, Victoria, and payable in another, *e. g.*, England.⁸

The discharge of a debt under the bankruptcy law of the country where it is made payable (*lex loci solutionis*) is possibly a valid discharge in England, but this is not certain.⁹

The discharge from any liability which does not arise from a contract, *e. g.*, liability to pay damages for a tort, under the bankruptcy law of the country where the liability has arisen (*lex loci delicti commissi*) is a valid discharge in England.¹⁰

A discharge, be it noted, cannot have a greater extra-territorial effect than it has under the law of the country where it is obtained. A bankruptcy, *e. g.*, in Victoria, will in no case free a debtor in England from any liability from which he is not dis-

¹ 2 Stra. 733.

² Cook, *Bk. Law*, 419.

³ 5 East, 124.

⁴ Buck. 57.

⁵ 1 Knapp, 265, 266, n.

⁶ 2 B. & S. 743.

⁷ L. R. 6 Q. B. 1, 28.

⁸ Compare, however, *Gibbs v. Société Industrielle*, 1890, 25 Q. B. D. (C. A.) 399, 405, judgment of *Esher*, M. R.

⁹ Compare *Gardiner v. Houghton*, 1862, 2 B. & S. 743, 745, language of *Blackburn*, J., and *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 234, judgment of *Bovill*, C. J., with *Potter v. Brown*, 1804, 5 East, 124, 130, judgment of *Ellenborough*, C. J., and *Gardiner v. Houghton*, 2 B. & S. 743, 748, judgment of *Cockburn*, C. J.

¹⁰ See *Phillips v. Eyre*, 1870, L. R. 6 Q. B. 1, 28, compared with *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 234, and *Westlake*, pp. 281, 282.

charged under the Victorian bankruptcy law; nor, conversely, will an English bankruptcy free him in Victoria from any debt from which he is not discharged under the English Bankruptcy Act.¹

A discharge, again, under the law of a foreign country, will not operate in England unless it is an extinction of the debt or liability; if, in the country where it is obtained, it interferes merely with the remedies or the procedure for enforcing the bankrupt's liabilities, it will not be a discharge in England.²

Illustrations.

1. *X* incurs a debt to *A* in Victoria for goods there sold and delivered by *A* to *X*. Afterwards *X* obtains a discharge under the Victorian insolvency law. The discharge is an answer to an action for the debt in England.³

2. A bill is drawn in one of the United States by *X* in favour of *A* on a person in England. It is dishonoured by non-acceptance. The drawer is discharged in America under the bankruptcy law there in force. The discharge is valid in England.⁴

3. *X* enters in England into a contract with *A* to pay him £100. The debt is made payable in Victoria and not elsewhere. *X* is made bankrupt in Victoria and obtains a discharge from the debt. The discharge (*semble*) is valid in England.⁵

RULE 113.⁶ — Subject to Rule 114, the discharge from any debt or liability under the bankruptcy law of a country where such debt or liability has neither —

(1) been contracted or has arisen, nor

(2) is to be paid or satisfied,

is not a discharge therefrom in England.

¹ For such debts, see Bankruptcy Act, 1883, s. 30.

² See *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 238, and *Story*, s. 338.

³ *Gardiner v. Houghton*, 1862, 2 B. & S. 743; *Quelin v. Moisson*, 1827, 1 Knapp, P. C. 265 (n); *Smith v. Buchanan*, 1800, 1 East, 6; *Potter v. Brown*, 1804, 5 East, 124.

⁴ *Potter v. Brown*, 1804, 5 East, 124. Compare *Symons v. May*, 1851, 6 Ex. 707; 20 L. J. Ex. 414; compare also, *Chalmers, Bills of Exchange*, 4th ed., pp. 242, 243.

⁵ See note 2, p. 449, *ante*.

⁶ *Gibbs v. Société Industrielle*, 1890, 25 Q. B. D. (C. A.) 399; *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 234; *Smith v. Buchanan*, 1800, 1 East, 6; *Lewis v. Owen*, 1821, 4 B. & Ald. 654; *Phillips v. Allan*, 1828, 8 B. & C. 477; *Bartley v. Hodges*, 1861, 1 B. & S. 375; 30 L. J. Q. B. 352.

Comment.

"As a general proposition, it is . . . true that the discharge of a debt or liability, by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country."¹

"The general rule," says Lord Esher, "as to the law which governs a contract, is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract, not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. . . . The parties are taken to have agreed that the law of such country shall be the law which is applicable to the contract. Therefore, if there be a bankruptcy law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought. That, at any rate, is the law of England on the subject. So, where a contract is made or is to be performed in a foreign country, so as to be a contract of that country, and there is a bankruptcy law, or the equivalent of a bankruptcy law, of that country, by which, under the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country. But it is only in virtue of the principle which I have mentioned that such a discharge from a contract takes place. It is now, however, suggested that, where by the law of the country in which the defendants are domiciled, the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can

¹ *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 234, judgment of *Bovill*, C. J. Compare *Gibbs v. Société Industrielle*, 1890, 25 Q. B. D. (C. A.) 399, 406, judgment of *Esher*, M. R.

"be taken to have agreed to be bound ; it is the law of another country, by which they have not agreed to be bound."¹

The effect, then, of Rules 112, 113, is, that the validity in England of the discharge from a contract under the bankruptcy law of a foreign country depends (in so far as the case does not fall within Rule 114), as does the validity of every other discharge, on its being a discharge under the proper law of the contract.² But it should be borne in mind that, in determining the extra-territorial effect of a discharge in bankruptcy, the Courts appear to be specially ready to assume that the law of a country where a contract is made (*lex loci contractus*) is the proper law of the contract, and very probably hold that a discharge under the bankruptcy law of the country where a contract is made is valid everywhere, even though the contract be performable in another country.³

Illustrations.

1. *X*, a Frenchman domiciled in France, makes a contract with *A*, an Englishman, for the purchase of copper. The copper is, under the contract, to be delivered by *A* to *X* at Liverpool, and *X* is to pay for it in London. The contract, moreover, is made subject to the rules of the London Metal Exchange. *X* makes default in accepting the copper, and afterwards obtains in France from a French Court a discharge in bankruptcy or liquidation. Such a discharge frees *X* under French law from liability for the breach of the contract. *A* brings an action against *X* in England for breach of contract. The discharge under the French bankruptcy is not an answer to the action, *i. e.*, it is not a valid discharge.⁴

2. *A* draws, and *X* accepts, a bill in England, and *X* also borrows money from and states accounts with *A* in England. *X* after this becomes bankrupt in Victoria, and obtains his discharge under the Victorian bankruptcy laws. *A* brings an action in England against *X* on the bill for money lent and on the accounts stated. The discharge in Victoria is not a defence to the action, *i. e.*, the discharge is not valid.⁵

¹ *Gibbs v. Société Industrielle*, 1890, 25 Q. B. D. (C. A.) 399, 405, 406, judgment of *Esher*, M. R.

² As to meaning of "proper law of the contract," see Rule 143, p. 540, *post*; as to discharge, see Rule 150, p. 575, *post*.

³ The bankrupt's domicile has no bearing on the extra-territorial effect of a discharge. See *Gibbs v. Société Industrielle*, 1890, 25 Q. B. D. (C. A.) 399, compared with *Gardiner v. Houghton*, 1862, 2 B. & S. 743.

⁴ *Gibbs v. Société Industrielle &c.* 1890, 25 Q. B. D. (C. A.) 399.

⁵ *Bartley v. Hodges*, 1861, 1 B. & S. 375.

RULE 114.¹—A discharge from any debt or liability under a Bankruptcy Act of the Imperial Parliament, and hence under —

(1) an English bankruptcy,²

(2) an Irish bankruptcy,³

(3) a Scotch bankruptcy,⁴

is, in any country forming part of the British dominions, a discharge from such debt or liability, wherever, or under whatever law, the same has been contracted or has arisen.

Comment.

An Act of the Imperial Parliament discharging a debtor from a debt takes effect throughout the whole of the Crown's dominions, and a discharge under such an Act is valid in every part of the British Empire, and this irrespective of the question where it is that the debt or other liability has arisen, or what may be the proper law of the contract under which it has been incurred.⁵ A discharge, therefore, under the English Bankruptcy Act, 1883, is a valid discharge, *e. g.*, in Scotland or in Victoria, of debts or liabilities incurred, whether in Scotland, or in Victoria, or elsewhere; whilst a discharge under the Scotch Bankruptcy Act,⁶ or under the Irish Bankruptcy Act, is a valid discharge, *e. g.*, in England or in Victoria, of debts or liabilities wherever incurred.

¹ *Westlake*, pp. 282, 283; *Foote*, p. 460; *Piggott*, pp. 340–344; *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228; *Gill v. Barron*, 1868, L. R. 2 P. C. 157, 175, 176; *Ferguson v. Spencer*, 1840, 2 Scott N. R. 229; 1 M. & G. 987; *Sidaway v. Hay*, 1824, 3 B. & C. 12; *Philpotts v. Reed*, 1819, 1 Br. & Bing. 294. This case, which is cited and commented upon, *Piggott*, p. 344, is specially instructive, as the discharge, though directly under an Imperial Act of Parliament, was a colonial discharge.

² *I. e.*, under the Bankruptcy Act, 1883, 46 & 47 Vict. cap. 52. See Rule 67, p. 343, *ante*.

³ *I. e.*, under the Irish Bankrupt and Insolvent Act, 1857, 20 & 21 Vict. cap. 60.

⁴ *I. e.*, under the Bankruptcy (Scotland) Act, 1856, 19 & 20 Vict. cap. 79. See especially, ss. 140, 147, 148.

⁵ *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 234–236; *Sidaway v. Hay*, 1824, 3 B. & C. 12; *Ferguson v. Spencer*, 1840, 1 M. & G. 987; *Simpson v. Mirabita*, 1869, L. R. 4 Q. B. 257.

⁶ The Scotch Bankruptcy Act, 1856, ss. 140, 147, 148, specially provides that a discharge under the Act shall have effect throughout the dominions of the Crown. (*Goudy*, 2nd ed., p. 638.) The English and Irish Bankruptcy Acts do not contain a similar provision, but the effect of a discharge under either of them is none the less extensive.

“An adjudication in bankruptcy, followed by a certificate of discharge in this country under the bankrupt laws passed by the Imperial Legislature, has the effect of barring any debt which the bankrupt may have contracted in any part of the world, and it would have the effect of putting an end to any claims in the island of Barbadoes, or elsewhere, to which the [bankrupt] might have been liable at the date of the adjudication.”¹

Rule 114, combined with Rule 113, leads to the result that a discharge under an English Bankruptcy Act is, in Victoria, a discharge from a debt contracted in Victoria or elsewhere, whilst a discharge under a Victorian Bankruptcy Act is not in England a discharge from a debt or liability not arising in Victoria.²

Question 1. — Is the discharge under the bankruptcy law of a foreign country impeachable in England on the ground that the Courts of the foreign country had no jurisdiction to make the debtor a bankrupt?

The reply must, it is submitted, be in the negative.

If the bankruptcy takes place in Ireland or Scotland, it is extremely doubtful whether an English Court can question the jurisdiction of the Irish or Scotch Bankruptcy Court.³

If the bankruptcy takes place in a country outside the United Kingdom, *e. g.*, in Victoria or New York, then, if the discharge operates in England at all, the debtor has as a fact been relieved from liability to pay his debt under the proper law of the contract, *i. e.*, speaking generally, under the law of the country where the contract was made, and, this being so, the discharge ought to be operative in England independently of the jurisdiction of the foreign Court to make the debtor a bankrupt.

Question 2. — Can a discharge under the bankruptcy law of a foreign country be impeached in England for fraud?

The answer apparently is that it can. The grounds on which a foreign judgment, even when given by a Court of competent jurisdiction, is impeachable for fraud⁴ seem equally applicable to a discharge in bankruptcy.

¹ *Gill v. Barron*, 1868, L. R. 2 P. C. 157, 175, 176, *per Curiam*. See *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 234, 235.

² See for explanation of doctrine on which Rules 111 to 114 (pp. 448-454, *ante*) are based, App., Note 10, *Theoretical Basis of the Rules as to the extra-territorial effect of a Discharge in Bankruptcy*.

³ See p. 340, *ante*, as to the analogous question, whether any Court in the British dominions can question the jurisdiction of an English Bankruptcy Court.

⁴ See pp. 404-406, *ante*.

(B) FOREIGN GRANT OF ADMINISTRATION.

RULE 115.¹ — A grant of administration or other authority to represent a deceased person under the law of a foreign country, has no operation in England.

This Rule must be read subject to the effect of Rules 119 to 121.

Comment.

A foreign representative of the deceased who wishes to represent him in England must obtain a grant of administration here, and cannot in general be sued here in his character of foreign personal representative.² Our Rule is, in short, an application of the general principle that no person will be recognised by English Courts as personal representative of the deceased unless and until he has obtained an English grant of probate or letters of administration.³

Illustrations.

1. An Englishman dies intestate domiciled in New York, leaving goods there. A takes out administration in New York. X, in England, owes a debt to the deceased. A cannot bring an action in England against X until he has obtained an English grant of administration.⁴

2. An Englishman dies in 1846 at Geneva, where his will is proved. A is X's personal representative under the law of Geneva. A sum of £34 is due to the deceased, and has been paid into Court. A has not taken out probate in England. He applies for payment of the £34. Payment is refused.⁵

RULE 116.⁶ — Where a person dies domiciled in a for-

¹ See *Story*, s. 513 ; *Foote*, 2nd ed., pp. 269, 270 ; *Williams, Executors*, 9th ed., pp. 367, 368 ; *Carter & Cross's Case*, 1585, Godb. 33 ; *Tourton v. Flower*, 1735, 3 P. Will. 368, 370 ; *Bond v. Graham*, 1842, 1 Hare, 482.

² As to this, see Rule 118, p. 462, *post*.

³ See as to executor *de son tort*, *Walker & Elgood*, 2nd ed., pp. 299, 300, and note especially that an executor derives an inchoate right from the will, and in some respects can rightfully act as personal representative, e. g., commence an action, before he has obtained probate. See also, *Rogers v. Frank*, 1827, 1 Y. & J. 409, 414, judgment of *Alexander*, C. B.

⁴ *Carter & Cross's Case*, 1585, Godb. 33 ; *Tourton v. Flower*, 1735, 3 P. Will. 368.

⁵ *Lasseur v. Tyrconnel*, 1846, 10 Beav. 28.

⁶ 1 *Williams, Executors*, 9th ed., pp. 366, 367 ; *Westlake*, 3rd ed., pp. 96-99 ;

foreign country, the Court will (in general) make a grant¹ to his personal representative under the law of such foreign country.

Comment.

A foreign personal representative has, as such, no authority in England; but our Courts recognise the primary, though certainly not the exclusive,² jurisdiction of the Courts of a deceased person's domicile to administer his movable property, and to determine who is the person entitled to deal with such property.³ When, therefore, any person, under whatever name, is appointed by the Courts of the domicile to represent the deceased, such representative has, as a rule, a claim,⁴ though not an absolute right, to an English grant, and such grant will usually be made to him by the Court, which will moreover, in general, follow the foreign grant so as to give the foreign personal representative no more than such powers as are required for the performance by him in England of the duties imposed upon him under the law of the deceased person's domicile.⁵

It may happen that under the law of the foreign domicile no person is appointed by any Court to represent the deceased. In this case that person will be treated as his representative who has, under the law of the foreign country, a right, *e. g.*, as heir or universal successor, to deal with the property of the deceased.⁶

The Court, however, may in its discretion decline to grant administration to the foreign personal representative of the deceased if there be any reason for the refusal.

Foote, 2nd ed., p. 265; *Nelson*, pp. 207, 208, 210; *Re Bianchi*, 1859, 1 Sw. & Tr. 511; *In re Earl*, 1867, L. R. 1 P. & D. 450; *Laneville v. Anderson*, 1860, 2 Sw. & Tr. 24; *In Goods of Smith*, 1868, 16 W. R. 1130; *In Goods of Hill*, 1870, L. R. 2 P. & D. 89; *In Goods of Prince Oldenburg*, 1884, 9 P. D. 234; *In Goods of Dost Aly Khan*, 1880, 6 P. D. 6.

¹ See, for meaning of "grant," Rule 61, p. 312, *ante*.

² See *Enohin v. Wylie*, 1862, 10 H. L. C. 1, and contrast pp. 13-16, language of *Westbury, C.*, with p. 19, language of Lord *Cranworth*, and pp. 23, 24, language of Lord *Chelmsford*, and *In re Trufort*, 1887, 36 Ch. D. 600, 611, judgment of *Stirling, J.*

³ *Ibid.*, and compare *In Goods of Briesemann*, [1894] P. 260; *In Goods of Earl*, 1867, L. R. 1 P. & D. 450.

⁴ *In Goods of Earl*, 1867, L. R. 1 P. & D. 450; *In Goods of Hill*, 1870, L. R. 2 P. & D. 89.

⁵ *In Goods of Earl*, 1867, L. R. 1 P. & D. 450, 453, judgment of Sir *J. P. Wilde*; *In Goods of Smith*, 1868, 16 W. R. 1130; *In Goods of Briesemann*, [1894] P. 260, 261.

⁶ *Laneville v. Anderson*, 1860, 2 Sw. & Tr. 24.

"The result of the cases is, that in the Prerogative Court the tendency was to follow the foreign grant where it could be done, but there was a reluctance to lay down any absolute rule in the matter, whilst the decisions in the Court of Probate (as *In the Goods of H. R. H. the Duchess d'Orléans*)¹ have militated against the rule of following the foreign grant,"² and the Court, whilst in general granting administration to a foreign representative appointed by the Court of the deceased's domicile, will constantly vary the form of the grant if a variation is needed by the requirements of English law.³

Illustrations.

1. *T* dies domiciled in the Mauritius, leaving a will and codicil signed but not witnessed. Probate is granted in the Mauritius to *A*. The Court makes a grant to *A*.⁴

2. *N* dies domiciled in Brazil intestate. *P* is appointed by a Brazilian Court guardian of *N*'s children. *P* appoints *Q*, the Brazilian Minister at Turin, his attorney in the matter, with power of substitution, and issues letters of request to judicial authorities in England to deliver property of deceased to *Q* or his representative. *Q* appoints *A*, resident in England, his substitute. The Court makes a grant to *A*.⁵

3. *T*, an Englishman, dies domiciled in France. He appoints under his will an *exécuteur testamentaire*. It is determined by a French Court that the time limited by French law for the execution of such executorship has passed; that such executor has no longer a right to intermeddle in *T*'s estate; and that *A* and *B*, the parties beneficially entitled, are the only persons who have a right to intermeddle. The executor applies for an English grant. The Court refuses to make a grant to the executor, and grants administration to *A* and *B*.⁶

4. *T* dies domiciled in France. *A*, a French citizen, also dom-

¹ 1859, 1 Sw. & Tr. 253; 28 L. J. P. & M. 129.

² *In Goods of Earl*, 1867, L. R. 1 P. & D. 450, 452, judgment of Sir J. P. Wilde. Compare *In Goods of Weaver*, 1866, 36 L. J. P. & M. 41.

³ See *In Goods of Cosnahan*, 1866, L. R. 1 P. & D. 183. Under 24 & 25 Vict. cap. 121, s. 4, treaty arrangements may be made with any foreign state so that the consul of such state may, in the absence of any person entitled to administration, be able to administer the personal property of subjects thereof dying in Her Majesty's dominions.

⁴ *In Goods of Smith*, 1850, 2 Rob. Ecc. Rep. 332. See *In Goods of Mackenzie*, 1856, Deane & Sw. 17.

⁵ *Re Bianchi*, 1859; 1 Sw. & Tr. 511.

⁶ *Laneville v. Anderson*, 1860, 2 Sw. & Tr. 24.

iciled in France, is under French law entitled to represent *T*, and to the possession of *T*'s property. *A* is, according to English law, a minor. *A* applies for a grant of administration, with the will annexed, of the goods of *T* in England. The grant is refused, on the ground that in England a grant cannot be made to a minor.¹

RULE 117.² — A foreign personal representative has (semble) a good title in England to any movables of the deceased which —

- (1) if they are movables which can be touched, *i. e.*, goods, he has in any foreign country acquired a good title to under the *lex situs*³ [and has reduced into possession (?)] ;
- (2) if they are movables which cannot be touched, *i. e.*, debts or other choses in action, he has in a foreign country acquired a good title to under the *lex situs*, and has reduced into possession.⁴

Comment.

This Rule, and especially clause (1), rests on but slight authority. It is, however, supported by writers of weight, and is in the main a deduction from the principle contained in Rules 140 and 141.⁵

(1) *As to goods.* — “The corporeal chattels [goods] of a deceased person belong,” writes Westlake, “to the heir or administrator who first reduces them into possession within the territory from the law or jurisdiction of which he derives his title or his grant.”⁶

¹ *In Goods of Duchess d'Orléans*, 1859, 1 Sw. & Tr. 253 ; 28 L. J. P. & M. 129.

² See chap. xxiii., Rule 140, p. 530, *post*, and cases cited in note thereto. Compare *Westlake*, 3rd ed., p. 110, and *Story*, s. 516, with *Foote*, pp. 275–277. And see *Currie v. Bircham*, 1822, 1 D. & R. 35 ; *Jauncy v. Sealey*, 1686, 1 Vern. 397 ; *Vanquelin v. Bouard*, 1863, 15 C. B. n. s. 341 ; 33 L. J. C. P. 78 ; contrast *Whyte v. Rose*, 1842, 3 Q. B. 493, 506. See Rule 72, p. 348, *ante*. With this Rule should be read Rule 118, p. 462, *post*.

³ For meaning of *lex situs*, see pp. 66, 74, *ante*.

⁴ *In re Macnichol*, 1874, L. R. 19 Eq. 81.

⁵ See chap. xxiii., pp. 530, 533, *post*. Compare Rule 72, p. 348, *ante*.

⁶ *Westlake*, 3rd ed., p. 110. He supports his view on the following three dicta from *Whyte v. Rose*, 1842, 3 Q. B. 493 : (i) “If property came to England after the death, would the foreign administration give a right to

"If a foreign administrator," writes Story, "has, in virtue of his administration, reduced the personal property of the deceased there situated [*i. e.*, situate in the foreign country] into his own possession, so that he has acquired the legal title thereto according to the laws of that country; if that property should afterwards be found in another country, or be carried away and converted there against his will, — he may maintain a suit for it there in his own name and right personally, without taking out new letters of administration; for he is, to all intents and purposes, the legal owner thereof, although he is so in the character of trustee for other persons. . . . The plain reason . . . is, that the executor . . . [has] . . . in his own right become full and perfect legal [owner] of the property by the local law; and a title to personal property, duly acquired by the *lex loci rei sitæ*, will be deemed valid, and be respected as a lawful and perfect title in every other country."¹

This reason, obviously the right one, forcibly suggests that our Rule should be more broadly stated, and that a foreign personal representative who has in a foreign country acquired a title to goods in accordance with the *lex situs* has the rights of an owner in England, even in the rare cases where he has acquired a title to without obtaining possession of the goods.²

(2) *As to debts.* — The *situs* of a chose in action being always more or less of a fiction,³ a debt may well for our present purpose be considered situate at the place where it is reduced into possession, *e. g.*, by payment, or by the obtaining of judgment for it; whence it would naturally follow that the personal representa-

"it?" *Ibid.*, p. 506, per Rolfe, B. (ii) "Suppose, after a man's death, his watch be brought to England by a third party, could such party, in answer to an action of trover by an English administrator, plead that the watch was in Ireland at the time of the death?" *Ibid.*, per Parke, B. (iii) "It seems to me that your argument goes too far, and would show that no administration in England could give a right over goods anywhere out of England. A man may sue here in his own right, naming himself as executor or administrator under a foreign probate or grant; but does a man ever sue here in the character of executor or administrator under such a probate or grant?" *Ibid.*, 504, 505, per Abinger, C. B. These dicta are extremely vague, and, even if they can be so interpreted as to support Westlake's view, they were delivered at a time when less deference was paid than at present to a title acquired under the *lex situs*.

¹ Story, s. 516. The words omitted refer to the analogous case of a legatee.

² So apparently Foote, 3rd ed., p. 275. It should be noted that negotiable instruments payable to bearer are to be considered as goods, and come within clause (1) of our Rule. See Story, s. 517, and Westlake, 3rd ed., p. 111.

³ See pp. 318–321, *ante*.

tive who has thus reduced it into possession has a title to it in England or elsewhere.¹ The question, however, whether a debt has or has not been duly reduced into possession by a judgment depends on the answer to the inquiry whether the judgment has been given by a "Court of competent jurisdiction," in the sense in which that term is used in these Rules.² If this question be answered in the negative, the judgment has no effect in England.³

Question 1. — What is the position of a foreign personal representative who receives payment of debts in England? ⁴

He is apparently in the position of an executor *de son tort*; he has no right to collect debts due to the deceased in England, he cannot (seem) retain the money paid him against an English administrator nor give a discharge for the debt.

Question 2. — Is payment by a debtor to a foreign personal representative a discharge from the debt in England as against the English administrator? ⁵

(1) Such a payment, when made in England, can hardly (it would seem) be a discharge. The debtor is under no compulsion to pay the foreign administrator who cannot as such sue for the debt, but the debtor from the mere fact of being in England is liable at any moment to be sued by the English administrator.

(2) The effect of such a payment when made in a foreign country would seem to depend mainly upon the *situs* of the debt,⁶ or in other words upon the place where the debt is most properly recoverable. If a debtor of a deceased person dying domiciled in New York, who is himself resident in New York, pays the debt to the New York administrator, such payment would, it is submitted, be a discharge from the debt in England as against any claim of the English administrator, and the same result would probably follow if the debtor making the payment is resident in New York, even though the deceased died domiciled in England. If, on the other hand, a debtor habitually resident in England, indebted to a deceased person dying domiciled in England, were

¹ *In re Macnichol*, 1874, L. R. 19 Eq. 81; *Vanquelin v. Bouard*, 1863, 15 C. B. N. s. 341.

² See p. 361, *ante*.

³ See Rule 89, p. 400, *ante*.

⁴ *Story*, s. 514 b; *Foote*, p. 278.

⁵ Compare *Story*, ss. 514–515 a, and especially, s. 515, note 3. See also, *Foote*, p. 279.

⁶ Compare *Daniel v. Luker*, 1571, Dyer, 305 a; *Whyte v. Rose*, 1842, 3 Q. B. 493; *Huthwaite v. Phaire*, 1840, 1 M. & G. 159. These cases, though not decisive, certainly suggest that the *situs* of the debt is the matter to be mainly considered.

in New York voluntarily to pay the debt to the New York administrator, the payment would not (semble) be a discharge as against the English administrator, and the same remark would perhaps hold good even though the deceased creditor died domiciled in New York.¹

Illustrations.

1. Deceased has died leaving goods in New York. *A* is his administrator under the law of New York. *A* takes possession as administrator of goods of the deceased. The goods are taken to England. *A* is the owner of the goods, and can bring an action in England against *X* who converts them.

2. Deceased has died leaving goods in New York. After *A* has taken out administration in New York, but before *A* has obtained possession of the goods, *X* takes them without *A*'s authority to England, where *B* has obtained a grant of administration as personal representative of the deceased. Whether *A* is in England owner of the goods, and whether he can bring there an action of trover against *X*?²

3. Deceased has died intestate in India, where *A* takes out letters of administration. *A* sends proceeds of deceased's effects to *X*, her agent in England. *B*, the English administrator, cannot bring an action against *X* for the money of the intestate received by him, *i. e.*, it is money belonging to *A*.³

4. *A*, the Indian administrator of *N*, obtains in India a judgment against *X* for £5,000 due to *N*. *A* can bring an action against *X* in England in *A*'s own name without taking out a grant of administration in England, *i. e.*, the debt having been reduced into possession, *A* has a good title to it.⁴

RULE 118.⁵ — A foreign personal representative is not, as such, under any liability in England, and cannot, as foreign personal representative, be sued in England.

Provided that

(1) if the foreign personal representative sends or

¹ This point is very doubtful. Compare *Story*, s. 515, note 3. If the payment were made in New York under compulsion, *i. e.*, in consequence of an action, the effect of the payment as a discharge might perhaps depend on whether the debtor had or had not pleaded before the New York Court that the debt was due to the English administrator.

² See pp. 459–461, *ante*.

³ *Currie v. Bircham*, 1822, 1 D. & R. 35.

⁴ *In re Macnichol*, 1874, L. R. 19 Eq. 81.

⁵ *Story*, s. 513; *Beavan v. Hastings*, 1856, 2 K. & J. 724.

brings into England movables of a deceased which have not been so appropriated as to lose their character as part of the property of the deceased, an action, to which the English administrator must be a party, may be brought for their administration in England ;¹

- (2) the foreign personal representative may by his dealing with the property of the deceased incur personal liability in England.²

Comment.

"It has . . . become a general doctrine of the common law, recognised both in England and America, that no suit can be brought or maintained by any executor or administrator, or against any executor or administrator [or other foreign personal representative] in his official capacity, in the Courts of any other country, except that from which he derives his authority to act in virtue of the probate and letters of administration there granted to him."³ The English authorities "fully establish the doctrine that, if a foreign executor or administrator [or other personal representative] brings or transmits property here, which he has received under the administration abroad, or if he is personally present, he is not either personally, or in his representative capacity, liable to a suit here ; nor is such property liable here to creditors ; but they must resort for satisfaction to the forum of the original administration."⁴

These statements must, however, be taken subject to the provisions of Rule 118, which amount in substance to this : that though a foreign administrator or other personal representative cannot in England be made liable for property held, or acts done by him in his character of foreign administrator, yet he may by his conduct place himself in some position in which he, speaking

¹ See especially, *Westlake*, p. 112, s. 99. See also, *Lowe v. Fairlie*, 1817, 2 Mad. 101 ; *Logan v. Fairlie*, 1825, 2 S. & St. 284, 291, judgment of *Leach*, V. C. ; *Sandilands v. Innes*, 1829, 3 Sim. 263, 264, judgment of *Leach*, V. C. ; *Bond v. Graham*, 1842, 1 Hare, 482. Contrast *Arthur v. Hughes*, 1841, 4 Beav. 506.

² See *Westlake*, p. 113 ; *Anderson v. Caunter*, 1833, 2 My. & K. 763 ; *Twyford v. Trail*, 1834, 7 Sim. 92.

³ *Story*, s. 513. Or otherwise. The foreign personal representative need not be in strictness an executor or administrator.

⁴ *Ibid.*, s. 514 b. But see *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34.

broadly, as a trustee, or possibly as a debtor,¹ incurs legal liabilities which can be enforced in England.²

Illustrations.

1. *T* dies leaving property in Italy. *X* is in Italy his personal representative. *A* is his English administrator. *A* cannot maintain an action against *X* as personal representative of *T*, *e. g.*, to obtain discovery of *T*'s personal estate.³

2. *X* is *T*'s administrator under an Indian grant of administration. *X* comes to England bringing with him personal property of *T*'s which is still unappropriated, and part of *T*'s estate. *A*, *T*'s English administrator, can bring an action for the administration of such money.⁴

3. *X* is the foreign personal representative of *T*, who dies in a foreign country. *X* is guilty of a breach of trust in omitting to invest moneys left under *T*'s will for the benefit of *N*. *X*, when in England, is liable, not as foreign personal representative, but as trustee, to an action for breach of trust.⁵

4. *N*, an Englishman, dies intestate in a foreign country where he is possessed of real and personal property. *X*, his brother, who resides in England, is personal representative of *N* under the law of such foreign country, and there takes succession to *N* in a manner which renders *X* personally liable for the debts of *N*. *A*, a creditor of *N*, can maintain an action in England against *X* for a debt due from *N*, *i. e.*, *X* is liable, not as personal representative of *N*, but as being himself a debtor under the law of a foreign country.⁶

Extension of Irish Grant and Scotch Confirmation to England.

RULE 119.⁷ — An Irish grant will, on production of

¹ See Illustrations 2-4.

² Note also the effect of Rule 64, p. 326, *ante*, and Rule 70, p. 345, *ante*.

³ *Jauncy v. Sealey*, 1686, 1 Vern. 397.

⁴ Proviso 1. See *Lowe v. Fairlie*, 1817, 2 Mad. 101; *Sandilands v. Innes*, 1829, 3 Sim. 263; *Bond v. Graham*, 1842, 1 Hare, 482.

⁵ Proviso 2. *Twiford v. Trail*, 1834, 7 Sim. 92, 108.

⁶ See *Beavan v. Hastings*, 1856, 2 K. & J. 724.

⁷ "From and after the period at which this Act shall come into operation [1st January, 1858], when any probate or letters of administration to be granted by the Court of Probate in Ireland shall be produced to, and a copy thereof deposited with, the Registrars of the Court of Probate in England, such probate or letters of administration shall be sealed with the seal of the said last mentioned Court, and, being duly stamped, shall be of the like force

the said grant to, and deposition of a copy thereof with, the proper officer of the High Court of Justice in England, be sealed with the seal of the said Court, and be thereupon of the like force and effect, and have the same operation in England, as an English grant.

RULE 120.¹— A Scotch confirmation of the executor of a person duly stated to have died domiciled in Scotland, which includes besides the personal estate situate in Scotland also personal estate situate in England, will, on production of such confirmation in the High Court in England and deposition of a copy thereof with the proper officer of the said Court, be sealed with the seal of the said Court, and have thereupon in England the like force and effect as an English grant.

Comment.

In accordance with this Rule a Scotch confirmation, which is equivalent to an English grant of probate or letters of administration, may, by formal proceedings, be extended to England so as to have there the operation of an English grant.

Note, however, that a Scotch confirmation can be extended to

“and effect and have the same operation in England as if it had been originally “granted by the Court of Probate in England.” The Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 Vict. cap. 79), s. 95.

See further, the Judicature Act, 1873. Compare the Finance Act, 1894 (57 & 58 Vict. cap. 30), ss. 1, 6, 22.

For meaning of “Irish grant,” see Rule 73, p. 352, *ante*, the comment on which applies *mutatis mutandis*, to this Rule.

¹ “When any confirmation of the executor of a person who shall . . . have “died domiciled in Scotland, which includes, besides the personal estate situated “in Scotland, also personal estate situated in England, shall be produced in the “principal Court of Probate in England, and a copy thereof deposited with “the Registrar, together with a certified copy of the Interlocutor of the Com- “missary finding that such deceased person died domiciled in Scotland, such “confirmation shall be sealed with the seal of the said Court, and returned to “the person producing the same, and shall thereafter have the like force and “effect in England as if a probate or letters of administration, as the case may “be, had been granted by the said Court of Probate.” Confirmation and Pro- bate Act, 1858 (21 & 22 Vict. cap. 56), s. 12.

See further, the Judicature Act, 1873; the Sheriff Court (Scotland) Act, 1876, s. 41. Compare the Finance Act, 1894 (57 & 58 Vict. cap. 30), ss. 1, 6, 22.

And see Rule 74, p. 352, *ante*, and comment thereon.

England only when the deceased is stated to have died domiciled in Scotland, and has left personal estate both in Scotland and in England. The statement that he has died domiciled in Scotland must be inserted by the proper Scotch official in or on the confirmation.¹

Extension of Colonial Grant to England.

RULE 121.²— Whenever the Colonial Probates Act, 1892, is by Order in Council made applicable to any British possession, *i. e.*, to any part of the British dominions not forming part of the United Kingdom, the grant of probate or letters of administration will, on

- (1) payment of the proper duty, and
- (2) production of the said grant to, and deposition of a copy thereof with, the High Court in England,

be sealed with the seal of the said Court, and thereupon be of the like force and effect, and have the same operation in England, as an English grant.

¹ See 21 & 22 Vict. cap. 56, ss. 12, 15; 39 & 40 Vict. cap. 70, s. 41.

² “(1) Where a Court of Probate in a British possession, to which this Act [i. e., Colonial Probates Act, 1892,] applies, has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, a Court of Probate in the United Kingdom, be sealed with the seal of that Court, and thereupon, shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that Court.

“(2) Provided that the Court shall, before sealing a probate or letters of administration under this section, be satisfied, —

“(a) that probate duty has been paid in respect of so much (if any) of the estate as is liable to probate duty in the United Kingdom; and,

“(b) in the case of letters of administration, that security has been given in a sum sufficient in amount to cover the property (if any) in the United Kingdom to which the letters of administration relate;

“and may require such evidence, if any, as it thinks fit, as to the domicile of the deceased person.”

Colonial Probates Act, 1892 (55 Vict. cap. 6), s. 2, sub-ss. (1) and (2). See further, s. 6, and Interpretation Act, 1889, s. 18, sub-s. 2. The Act applies to all parts of the United Kingdom, but the present Rule is concerned only with its effect in England. See Rule 75, p. 354, *ante*.

AMERICAN NOTES.

CHAPTER XVII.

EFFECT IN THE UNITED STATES OF FOREIGN BANKRUPTCY; FOREIGN GRANT OF ADMINISTRATION.

(A) FOREIGN BANKRUPTCY.

1. UNDER THE LAWS OF A FOREIGN COUNTRY.—An assignment under the bankruptcy law of a foreign country has of itself no extra-territorial force, and “is incapable of operating a transfer of property in the United States.” *Harrison v. Sterry*, 5 Cranch, 289; *Moseby v. Burrow*, 52 Tex. 396; *Osborn v. Adams*, 18 Pick. 245. See *Chipman v. Peabody*, 159 Mass. 420; *Lamb v. Fries*, 2 Pa. St. 83; *Harvey v. Edens*, 69 Tex. 420. But by the comity of nations, which is part of the common law, the title of the foreign assignee under the foreign bankrupt law may, as to movables, be asserted and enforced by him in the Courts, though it cannot be effectual as against domestic creditors pursuing their remedies against the bankrupt or his property within the jurisdiction, or when the recognition of his title would violate a rule of public policy. *Matter of Waite*, 99 N. Y. 433, 448; *Phelps v. Borland*, 103 N. Y. 406; *State Bank Receiver v. Plainfield Bank*, 34 N. J. Eq. 450. But the liquidators of a foreign corporation cannot enforce against a resident a call on shareholders, the proceedings in which his liability was ascertained having been summary and in derogation of the common law. *Anderson v. Haddon*, 33 Hun, 436 (reversing *Anderson v. Haddon*, 9 Abb. (N. Y.) N. Cas. 289).

A firm of Americans, domiciled and engaged in business in Canada, attached in Pennsylvania certain debts due by citizens of that State to a firm in Scotland, for whom a trustee in bankruptcy had been appointed in that country. It was held that the attaching creditors, being domiciled in Canada, could not be permitted thus to acquire a preference over other creditors residing in Scotland, or elsewhere within the British dominions, the firm's effects having been duly transferred under the laws of Scotland to a trustee for the benefit of all the creditors. *Long v. Girdwood*, 150 Pa. St. 413; 24 Atl. 711; 30 W. N. C. 473.

A discharge in bankruptcy under the law of a foreign country has of itself no force in the United States. *Goodsell v. Benson*, 13 R. I. 225; *Baldwin v. Hale*, 1 Wall. 223; *McMillan v. McNeill*, 4 Wheat. 209. But it may be conclusive as between citizens of such country, *Harris v. Mandeville*, 2 Dall. 256; and, if a domestic creditor voluntarily becomes a party to the foreign proceeding and accepts the composition, he discharges the bankrupt from all liability, *Phelps v. Borland*, 103 N. Y. 406; 57 Am. Rep. 755.

The Canada Southern Railway Company, a Canadian corporation, having become embarrassed, the Canadian Parliament passed an act by which a scheme

of arrangement, to which a large majority of the holders of bonds and stock of the company had assented, was made binding on all holders of its bonds and stock. It was held that, although the act was in the nature of a bankrupt act, bondholders who were citizens of the United States, and who had not assented to the scheme of arrangement, could not recover in the Courts of the United States upon obligations from which the company was discharged by the Act of Parliament. "A corporation of one country may," said the Court, "be excluded from business in another country (*Paul v. Virginia*, 8 Wall. 168), but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorises. . . . It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere." *Canada Southern Railway Co. v. Gebhard*, 109 U. S. 527, 537, 538. For qualification of *Paul v. Virginia*, cited *supra*, see *Horn Silver Mining Co. v. New York*, 143 U. S. 305.

2. UNDER STATE BANKRUPTCY OR INSOLVENCY LAWS. — "An assignment under the laws of another State of the Union stands upon the same ground as one made under the laws of a foreign country; for the States are in this respect independent of one another, and subject to no common control so long as there is no national bankrupt law." *Taylor v. Columbian Ins. Co.* 14 Allen, 353. Hence an insolvent assignment under the laws of one State is inoperative to pass title to realty in another State. *Osborn v. Adams*, 18 Pick. 245; *Moseby v. Burrows*, 52 Tex. 396; *Jenks v. Ludden*, 34 Minn. 482; *Townsend v. Coxe* (Ill.), 37 N. E. 689. See *Chipman v. Peabody*, 159 Mass. 420; *Lamb v. Fries*, 2 Pa. St. 83; *Harvey v. Edens*, 69 Tex. 420. Nor is it permitted to prevail in another State against an attachment, by citizens of such State, of movables of the insolvent, *Cole v. Cunningham*, 133 U. S. 107; *Sturtevant v. Armsby Co.* (N. H.) 23 Atl. 368; *Rhawn v. Pearce*, 110 Ill. 350; 51 Am. Rep. 691; *Barth v. Backus*, 140 N. Y. 230; 35 N. E. 425; *Taylor v. Columbian Ins. Co.* 14 Allen, 353; or against an attachment in such State by a citizen of a third State, *Sturtevant v. Armsby Co.*, *supra*, 23 Atl. 368; *Harvey v. Watson*, 63 N. H. 466; *Townsend v. Coxe* (Ill.), 37 N. E. 689; *Paine v. Lester*, 44 Conn. 196; *Lichtenstein v. Gillett*, 37 La. An. 522; *Reynolds v. Adden*, 136 U. S. 348; or even against an attachment by a citizen of the same State as the assignee, *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; *Barth v. Backus*, 140 N. Y. 230; 35 N. E. 425; *Rhawn v. Pearce*, 110 Ill. 550; 51 Am. Rep. 691; *Sturtevant v. Armsby Co.*, *supra*. *Contra*, *Burlock v. Taylor*, 16 Pick. 335; *Cunningham v. Butler*, 142 Mass. 47; *Bagby v. Atlantic &c. Co.* 86 Pa. St. 291; *Lichtenstein v. Gillett*, 37 La. An. 522. *Rhawn v. Pearce*, and *Hibernia Nat. Bank v. Lacombe*, *supra*, both lay stress on a supposed decision in *Abraham v. Plestora*, 3 Wend. 538, which the Court, in *Matter of Waite*, 99 N. Y. 433, 445, say "cannot be known" to have been made.

A receiver appointed in one State has no authority in another State by virtue of his appointment. *Booth v. Clark*, 17 How. 332; *Bagby v. Atlantic &c. Co.*

86 Pa. St. 291; *Insurance Co. v. Needles*, 52 Mo. 17; *Catlin v. Wilcox Silver Plate Co.* 123 Ind. 477; *Lichtenstein v. Gillett*, 37 La. An. 522; *Brigham v. Ludington*, 12 Blatchf. 237. His title cannot be enforced in another State against attachments of creditors residing in such State, or in a State other than that of his appointment, *Cole v. Cunningham*, 133 U. S. 107; *John Ray Clark Co. v. Toby Valley Supply Co.* 3 Pa. Dist. 518; *President v. Maryland Steel Co.* 31 Wkly. Law Bul. 100; though it may be enforced against an attachment by a citizen of his own State, *Bagby v. Atlantic &c. Co.* 86 Pa. St. 291; *Lichtenstein v. Gillett*, 37 La. An. 522. See *Gilman v. Ketcham*, 84 Wis. 60; 54 N. W. 395; *Ogden v. Warren*, 36 Neb. 715.

Yet receivers of insolvent foreign corporations, and assignees of bankrupt or insolvent debtors, under the laws of other States, may sue and enforce their titles, except as against claims of domestic creditors or principles of public policy. *Petersen v. Chemical Bank*, 32 N. Y. 21; *Toronto Gen. Trust Co. v. C., B. & Q. R. R. Co.* 123 N. Y. 37; *Metzner v. Bauer*, 98 Ind. 425; *Ex parte Norwood*, 3 Biss. 504. See *Day v. Postal Tel. Co.* 66 Md. 354. Where a person, appointed as receiver in one State, receives an ancillary appointment in another State, and a judgment is rendered against him in the latter State after the revocation of his original appointment, such judgment binds only the assets which came into his hands as ancillary receiver, and does not operate as a final adjudication in the State of original administration. *Reynolds v. Stockton*, 140 U. S. 254; 11 Sup. Ct. 773. See *Falk v. Janes* (N. J. Eq.), 23 Atl. 813, as to the persistency of a receiver's lien on movables on their removal from one State to another.

To the general rule as to the effect of state insolvent proceedings, an exception has been made in certain cases of corporations whose affairs were in process of winding up in the States under whose laws such corporations were created. In these cases it has been held that creditors in other States could not attach debts in those States, or other assets of the corporation not placed there for their benefit, but must assert their rights in the liquidation proceedings; and that the powers of the receiver were not limited to the State in which he was appointed, but might be exercised in relation to the affairs of the corporation in other States. *Relfe v. Rundle*, 103 U. S. 222; *Fry v. Charter Oak Life Ins. Co.* 31 Fed. Rep. 197; *Parsons v. Charter Oak Life Ins. Co.* 31 Fed. Rep. 305; *Bockover v. Life Asso. of America*, 77 Va. 85.

An insolvent discharge under the laws of one State is no bar to an action brought by a citizen of another State in the Courts of the United States, or of any other State than that in which the discharge was obtained, unless the plaintiff became a party to the insolvent proceedings. *Cole v. Cunningham*, 133 U. S. 107, 114; 10 Sup. Ct. 269; *Baldwin v. Hale*, 1 Wall. 223; *Newton v. Hagerman*, 22 Fed. Rep. 525; *Carbe v. Mason*, 64 N. H. 10; 4 Atl. 791; *Norris v. Atkinson*, 64 N. H. 87; 5 Atl. 710. See *Geilinger v. Philippi*, 133 U. S. 246, 257, and American Notes under chap. x.

(B) FOREIGN GRANT OF ADMINISTRATION.

The term "foreign," as applied to an executor or administrator, refers to the origin of the representative character, and not to residence. *Hopper v. Hopper*, 125 N. Y. 400; 26 N. E. 457; *Fugate v. Moore*, 86 Va. 1045; 11 S. E. 1063. By the common law, the authority of a foreign executor or administrator is not recognised; and an executor or administrator appointed in one State cannot as such maintain any suit in another State. *Lawrence v. Nelson*, 143 U. S.

215, 222; *Johnson v. Powers*, 139 U. S. 156; 11 Sup. Ct. 525; *Duchesse d'Auxy v. Porter*, 41 Fed. Rep. 68; *Reynolds v. McMullen*, 55 Mich. 568; 54 Am. Rep. 386. Nor can he be sued in another State unless he comes there under certain circumstances with assets. *Fugate v. Moore*, 86 Va. 1045; 11 S. E. 1063; *Van Gieson v. Banta*, 40 N. J. Eq. 14; *Durie v. Blawvelt*, 49 N. J. L. 114; 6 Atl. 312; *Whittaker v. Whittaker*, 10 Lea (Tenn.), 93. In order to act officially in another State, he must obtain authority from the local tribunals. *Welsh v. Adams*, 152 Mass. 74; 25 N. E. 34; *Farrington v. Am. Loan & Trust Co.* 18 Civ. Proc. 135; 9 N. Y. Supp. 433. But the executor or administrator of the deceased's last domicile is usually recognised as the proper person to whom to grant ancillary administration, *Wharton, Conf. of L.* s. 608; *Matter of Blancan*, 4 Redf. (N. Y.) 151; and his lack of authority may be waived by failing to object to it, *Gregory v. McCormick* (Mo.), 25 S. W. 565; *Bertron v. Stewart*, 43 La. An. 1171; 10 So. 295; or, in the case of an executor, may be cured by subsequent probate of the will before hearing, *Gray v. Franks*, 86 Mich. 382. And an ancillary administrator may be sued by a non-resident in the State in which he receives ancillary authority, where the cause of action arose in such State. *Hopper v. Hopper*, 125 N. Y. 400; 26 N. E. 457.

As between administrators appointed in different States there is no privity; and a judgment recovered against the administrator of a deceased person in one State is no evidence of debt in a subsequent suit by the same plaintiff in another State, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. *Johnson v. Powers*, 139 U. S. 156, 159, and cases cited; *Black v. Henry G. Allen Co.* 42 Fed. Rep. 618; *McGarvey v. Darnall*, 143 Ill. 367; 26 N. E. 1005; *Farrington v. Am. Loan & Trust Co.* 18 Civ. Proc. 135; 9 N. Y. Supp. 433; *Price v. Mace*, 47 Wis. 23. See *Jones v. Warren*, 70 Miss. 227; 14 So. 25.

But the incapacity of foreign executors and administrators being due to reasons of form, and to a desire to protect the rights of resident creditors, their right to the assets of the deceased has in certain respects been recognised. *Wilkins v. Ellett*, 108 U. S. 256; *Petersen v. Chemical Bank*, 32 N. Y. 21, 43. Thus, where no suit is necessary, the foreign administrator may peaceably collect the movables of the deceased and carry them away for purposes of administration, *Petersen v. Chemical Bank*, 32 N. Y. 21, 44; *Selleck v. Rusco*, 46 Conn. 370; *Putnam v. Pitney*, 45 Minn. 242; *Metamara v. Metamara*, 62 Ga. 200; and payment to a foreign administrator is recognised, there being no local administration, *Wilkins v. Ellett*, 108 U. S. 256; *Wyman v. Halstead*, 109 U. S. 656; *Parsons v. Lyman*, 20 N. Y. 103. An administrator may assign promissory notes or other written evidences of debt which have come into his possession as administrator, and the assignee may sue thereon in his own name in another State, except so far as its laws may not permit the assignee of a chose in action to sue in his own name, *Wilkins v. Ellett*, 108 U. S. 256; *Solinsky v. Fourth Nat. Bank*, 82 Tex. 244; 17 S. W. 1050; *Campbell v. Brown*, 64 Iowa, 425; 52 Am. Rep. 446; but he cannot assign a debt secured by a mortgage on real estate in another State in derogation of its statutes, *Reynolds v. McMullen*, 55 Mich. 568; 54 Am. Rep. 386. See *Eells v. Holder*, 2 McCrary, 622; *Moore v. Jordan*, 36 Kans. 271.

An administrator may sue in his individual capacity in another State on a judgment recovered by him in his official capacity in his own State. *Tittman v. Thornton*, 107 Mo. 500; 17 S. W. 979; *Lewis v. Adams*, 70 Cal. 430; 11 Pac.

833; *Arizona Cattle Co. v. Huber* (Ariz.), 33 Pac. 555. And he may be sued on an agreement made by him in another State in relation to assets of the estate there. *Johnston v. Wallis*, 41 Hun. 420; affirmed 112 N. Y. 230.

The laws of various States authorise foreign executors and administrators to sue, or to sue and be sued, without obtaining ancillary administration, *Hayes v. Pratt*, 147 U. S. 557; *Henry v. Roe*, 83 Tex. 446; *Russell v. Hubbard*, 76 Ga. 618; *Murray v. Norwood* (Wis.), 46 N. W. 499; *Tyer v. Milling Co.* 32 S. C. 598; *Marrett v. Babb*, 91 Ky. 88; 15 S. W. 4; and a foreign corporation, authorised to act as administrator, may sue as such. *Fidelity Ins., Trust & Safe Deposit Co. v. Niven*, 5 Houst. (Del.) 416. See also, *Toronto Gen. Trust Co. v. C., B. & Q. R. R. Co.* 123 N. Y. 37. A statute authorising a foreign administrator to sue does not imply authority to be sued, *Greer v. Ferguson*, 54 Ark. 324; 19 S. W. 966; *Jones v. Lamar*, 77 Ga. 149; or to sue after the appointment of a local administrator, *Gibson v. Powder*, 40 Ark. 195; or to sue for intestate lands, though the statutes make such lands assets in the hands of a domestic administrator, *Fairchild v. Hagel*, 54 Ark. 61; 14 S. W. 1102. Where a foreign administrator is sued, the nature and extent of his liability depend upon the laws of the State of his appointment, *Hoskins v. Sheddon*, 70 Ga. 528; and he cannot be called to account before final settlement and order of distribution by the Court of administration in such State, *Snyder v. Hochstetter* (Iowa), 55 N. W. 573. A statute giving a foreign executor power to sell land which the will directs to be sold does not authorise him to sue for the specific performance of a contract relating to such land, without obtaining ancillary letters. *Marrett v. Babb*, 91 Ky. 88; 15 S. W. 4. See *Calloway v. Cooley*, 50 Kan. 743; 32 Pac. 372.

Where a will is probated in one State after the appointment of an administrator in another State, the Courts of the latter State will, on application of the executors, admit the will to probate for ancillary administration, thus revoking the prior administration, except as to assets already administered. *Thomas v. Morrisett*, 76 Ga. 384; *Willet's Appeal*, 50 Conn. 330.

See American Notes under chap. x.

BOOK III.

CHOICE OF LAW.

THE Rules contained in Book III. deal solely with the Choice of Law.¹

Their object is the determination of the body of law² which is to be selected by the High Court when called upon to decide any case which has in it a foreign element.³

The Rules contained in Book III. have nothing to do with the jurisdiction either of the High Court⁴ or of foreign Courts.⁵

But though a question as to the choice of law is in itself a totally different thing from a question of jurisdiction, there exists occasionally a difficulty in discriminating at a glance between the two inquiries ; for a question as to the choice of law may look like

¹ As to Choice of Law, see Intro., pp. 2, 22-38, 56-60, *ante* ; and compare *Holland, Jurisprudence*, 7th ed., pp. 360-364.

² The body of law, whether English or foreign, which ought to be chosen for the determination of a particular case, or class of cases, depends upon the nature of the right which is in dispute, and rights are naturally divided in accordance with their subject-matter. Hence the Rules as to the Choice of Law are conveniently distributed under the following heads : —

(1) Status or capacity. — Chaps. xviii. and xix., *post*.

(2) Family Relations. — Chap. xx., *post*.

(3) Immovables. — Chap. xxii., *post*.

(4) Movables. — Chap. xxiii., *post*.

(5) Contracts. — Chaps. xxiv. and xxv., *post*.

(6) Marriage. — Chap. xxvi., *post*.

(7) Torts. — Chap. xxvii., *post*.

(8) Administration in Bankruptcy. — Chap. xxviii., *post*.

(9) Administration and Distribution of Deceased's Movables. — Chap. xxix., *post*.

(10) Succession to Movables. — Chap. xxx., *post*.

(11) Procedure. — Chap. xxxi., *post*.

This distribution of our subject, though convenient, makes no claim to any special logical precision.

³ For meaning of "foreign element," see Intro., p. 1, *ante*.

⁴ As to the Jurisdiction of the High Court, see Book II., Part I., pp. 209-360, *ante*.

⁵ As to the Jurisdiction of Foreign Courts, see Book II., Part II., pp. 361-471, *ante*.

a question as to jurisdiction. That this is so may be shown by the following illustration: *A* brings in England an action against *X* for an assault at Paris; *X*'s defence is that the assault was by French law justifiable, and that *A* therefore cannot, in an English Court, recover damages for it. The defence looks like an objection to the jurisdiction of the Court; but this appearance will be found on examination to be delusive. Whatever be the technical form of *X*'s defence, he in substance pleads not that the High Court has no right to adjudicate upon an assault committed in France, but that the question whether *X* was or was not guilty of an assault, *i. e.*, of an unlawful attack upon *A*, must be determined in England by reference, not to the law of England, but to the law of France. *X* therefore raises a question as to the choice of law.¹

¹ As to law governing torts, see chap. xxvii., p. 659, *post*.

CHAPTER XVIII.

STATUS.

RULE 122.¹ — Transactions taking place in England are not affected by any status existing under foreign law which either

- (1) is of a kind unknown to English law, or
- (2) is penal.

Comment.

Status. — Every person has a certain civil status,² consisting of his capacity for the acquisition and exercise of legal rights and for the performance of legal acts. Thus *A*'s status or personal condition may be that of the ordinary or average citizen, who is of full age, legitimate, unmarried, and so forth, and has incurred no legal disability. Such a person has in England the capacity to inherit, to make a will, to bind himself by contracts, to change his domicil, and the like. His status, just because it is the average or ordinary condition, receives no special name. *A*'s condition or status, on the other hand, may differ from the ordinary standard in that he has legal capacities which either fall short of or exceed those of the ordinary citizen, so that he occupies a position by virtue of which, as it has been expressed,³ what is law for the average citizen is not law for him. Thus, if he is illegitimate, he does not inherit in cases in which the average citizen would do so. If he is an infant, he is not bound by contracts which bind others. If he is married, he has rights and incurs liabilities beyond those of the ordinary or average citizen. As *A*'s position is in these instances marked off from, and contrasted with, the condition of ordinary citizens, it receives a name such as

¹ Compare Intro., General Principle No. II. (B), p. 32, *ante*, and Rule 40, p. 220, *ante*. See *Story*, ss. 91, 92, 94–104, 620–625 c. [See American Notes under chap. xvi.]

As to how far the last clause of the Rule applies to countries subject to the British Crown?

² See especially, *Holland, Jurisprudence*, 7th ed., pp. 118–127.

³ See *Westlake*, 1st ed., s. 89.

that of illegitimacy, infancy, etc., and is clearly recognised as a status; and *A* has a status which may, in very general terms, be described as being "the legal position of [*A*] in or with regard to the rest of a community."¹

From the nature of status it is apparent that the term is a relative one, varying according to the laws of different communities. A man, for example, may be legitimate if his status is to be determined by the law of France, illegitimate if it is to be determined by the law of England. In no matter, moreover, do the laws of different countries differ more widely than in their rules as to status. Conditions, such as that of slavery, monastic celibacy, or civil death, which are known to the law of one state are unknown or absolutely repugnant to the legal system of another. Conditions, again, which in one form or another exist throughout the civilized world, are in different countries governed by different rules, and involve different incidents. Minority, to take one example, may terminate under one law at 21, under another at 24, under a third at 25;² and it may safely be asserted that in almost every different country the incapacities or the privileges of a minor are somewhat different.

When, therefore, it is necessary to determine what is a person's status, and how far his rights or acts are affected thereby, it is necessary, further, to determine what is the law with reference to which his status or condition must be fixed. Whether our Courts have on this subject adopted any one invariable principle may be doubted; but they have, of recent years, gone so far as to hold that an individual's legal condition is, in many cases, liable to be affected by the law of his domicile,³ and perhaps they may be said to have adopted, in a very general way, the rule that status depends *primâ facie* on domicile; but in practice this principle is subjected to limitations and exceptions which often go near to invalidating it.⁴

Status unknown to English Law.—The law of England will not in England allow any status (such for example as relationship arising from adoption),⁵ which is unknown to English law, to

¹ *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1, 11, per Brett, L. J.

² [The usual age of majority in the United States is 21.]

³ See *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1; *Udny v. Udny*, 1869, L. R. 1 Sc. Ap. 441.

⁴ See *Male v. Roberts*, 1800, 3 Esp. N. P. 163. See, e. g., Rule 146, p. 543, and Exceptions thereto, pp. 546, 548, *post*.

⁵ An intestate dies domiciled in England. *N*, the intestate's brother, has, before the intestate's death, become domiciled in California, and has there, in accordance with the law of California, adopted *A* as his son. *N* dies before,

have legal effects as regards transactions in England. Thus, even at the time when slavery existed in the English colonies, the status of a slave was not recognised in England, and a master who brought his slave there lost the right of ownership over him whilst in England.¹ "Slavery," it was laid down, "is a local law, and "therefore, if a man wishes to preserve his slaves, let him attach "them to him by affection, or make fast the bars of their prison, "or rivet well their chains; for the instant they get beyond the "limits where slavery is recognised by the local law they have "broken their chains, they have escaped from their prison and "are free."² On similar grounds, English Courts will not in England give effect to a polygamous marriage.³ Nor will they give any effect in England to disabilities arising from religious vows, from religious belief (as, for instance, where Jews or Protestants are under disabilities by the law of their domicile), or from "civil death," or "infamy,"⁴ or from a person being declared a "prodigal," and, therefore, under the law of a foreign country, incapable of suing.⁵

Penal status.—A penal status means one which is imposed upon a person in order to deprive him of rights or to inflict punishment upon him, as where *X* is affected with attainder. Such a penal status, though inflicted by the law of the country where *X* is domiciled, and though known to English law, will not be allowed to affect *X* as regards his rights to property in England.

"It is a general principle that the penal laws of one country "cannot be taken notice of in another."⁶ "I would," says Lord Loughborough, "even go farther, and say a right to recover any " . . . specific property, such as plate or jewels, in this country, "would not be taken away by the criminal laws of another. The "penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of "their authority. A fugitive who passes hither comes with all his "transitory rights; he may recover money held for his use, stock,

but *A* survives the intestate. *A* cannot claim the intestate's movables in England as next of kin, i. e., English law does not acknowledge relationship by adoption. Conf. *Blythe v. Ayers*, 96 Cal. 532; 31 Pac. 915.

¹ *Sommersett's Case*, 1771, 20 How. St. Tr. 1. See *The Slave Grace*, 1827, 2 Hagg. Ad. 94.

² *Forbes v. Cochrane*, 1824, 2 B. & C. 448, 467, per Best, J.

³ *Hyde v. Hyde*, 1866, L. R. 1 P. & D. 130.

⁴ See *Story*, ss. 91, 92, 620-624; 1 *Blackst. Comm.* 132, 133.

⁵ See *Worms v. De Valdor*, 1880, 49 L. J. Ch. 261; and compare *Atkinson v. Anderson*, 1882, 21 Ch. D. 100.

⁶ *Ogden v. Folliott*, 1790, 3 T. R. 726, 733, per Buller, J.

"obligations, and the like, and cannot be affected in this country
"by proceedings against him in that which he has left, beyond the
"limits of which such proceedings do not extend."¹

RULE 123.² — Any status existing under the law of a person's domicil is recognised by the Court as regards all transactions taking place wholly within the country where he is domiciled.

Comment.

Our Courts recognise every kind of status or personal condition held under the law of a country where a person is domiciled, in so far as such status affects acts done and rights exercised wholly in that country. Hence it has been laid down, with substantial accuracy, that "the status of persons with respect to acts done and rights acquired *in the place of their domicil*, and "contracts made *concerning property situated therein*, will be "governed by the law of that domicil; and that England . . . "will hold as valid or invalid *such* acts, rights, and contracts, "according as they are holden valid or invalid by the law of "the domicil."³

This clearly is so as regards any person domiciled in England. The transactions of such a person in England are, in so far as they may be affected by status, governed by English law. If A, for example, is a Frenchman domiciled in England, his capacity to contract in England depends on English law, without reference to the law of France.⁴

¹ *Folliott v. Ogden*, 1789, 1 H. Bl. 123, 135. See also, *Wolff v. Oxholm*, 1817, 6 M. & S. 92, 99. Compare *Lynch v. Provisional Government of Paraguay*, 1871, L. R. 2 P. & D. 268, and *Huntington v. Attrill*, [1893] A. C. 150; and see Rule 40, p. 220, *ante*.

² Compare *Phillimore*, s. 381; *Wharton*, s. 125. *Folliott v. Ogden*, 1789, 1 H. Bl. 123, throws some doubt on the principle of this Rule if carried out to its full extent. See, however, *Ogden v. Folliott*, 1790 (in error), 3 T. R. 726, by which it seems that the real ground of decision was that the confiscation by the State of New York, being made during the Rebellion, was held by our Courts inoperative, even as regards property in New York. See judgment of *Kenyon*, C. J., 3 T. R. 731; *Newton v. Manning*, 1849, 1 Mac. & G. 362, 364.

³ *Phillimore*, s. 381.

⁴ In many of the cases falling under this Rule the *lex actus* (or law of the country where a transaction takes place) and the *lex domicilii* are the same. It is therefore difficult to say for certain whether the character of the transaction is determined by our Courts with a view to the *lex actus* or the *lex domicilii*. Still the law of domicil would appear to be the guiding consideration.

The same principle applies to persons domiciled in a foreign country. If an English Court undertakes to determine the effect of acts done and rights exercised in a foreign country where a person is domiciled, the Court will recognise the effect of his status under the law of his domicile, without any reference to what would have been the status of such a person in England, or to what might or might not be the effect of his foreign status on transactions taking place in any other country than that of his domicile.

Minority, for example, lasts in Prussia till the age of 24. If, therefore, A, who is of the age of 22 and is domiciled in Prussia, makes a gift, or sells goods, or enters into a contract at Berlin, the effect of the transaction will be judged of by our Courts with reference to whatever be the privileges or incapacities of a minor under Prussian law. So, again, though civil death is not now known to our law,¹ its effects on the rights of a person affected by it in the country where he is domiciled will be noticed by our Courts. If, for example, under the law of Spain, the property of a person who becomes a monk should devolve, say, on his heir, English law would recognise the fact of the property in Spain of a person there domiciled having, through his taking monastic vows, devolved upon his heir. In other words, our Courts would (it is conceived), to this extent at any rate, recognise the effect of the monastic status.²

RULE 124.³—In cases which do not fall within Rule 122, the existence of a status existing under the law of a person's domicile is recognised by the Court, but such recognition does not necessarily involve the giving effect to the results of such status.

¹ See 1 *Blackst. Comm.*, pp. 132, 133.

² Compare *Santos v. Illidge*, 1860, 29 L. J. C. P. 348; 8 C. B. N. s. (Ex. Ch.) 861. The case is noticeable as showing the extent to which English Courts will, in regard to transactions in a foreign country, recognise the existence of conditions, such as slavery, unknown to English law.

³ In support of this Rule, see the authorities given in support of the Rules as to particular kinds of status. "It is a settled rule of English law that civil status, with its attendant rights and disabilities, depends, not upon nationality, but upon domicile alone." Judgment of P. C., *Abd-ul-Messih v. Farra*, 1888, 13 App. Cas. 431, 437.

Comment.

Three views as to status.—Three opinions, at least, may be held as to the relation between a person's status, or personal capacity, and the law of his domicil.

First view. A person's status depends (subject to certain exceptions coinciding in the main with cases falling under Rule 122) wholly on the law of his domicil.

This is the view maintained by many foreign jurists, and notably by Savigny.¹

According to this opinion, a person who is legitimate, or a minor, by the law of his domicil, is to be considered as legitimate or a minor all the world over. Thus, if *A*, a person domiciled in Scotland, is legitimate by the law of Scotland, he ought, though born out of lawful wedlock,² to be considered legitimate in England. So a person domiciled in Prussia who is of the age of 22 should be considered a minor in England till 24, and on similar grounds a domiciled Englishman of 22 ought to be considered of full age in Prussia.

From this view the consequence logically follows that not only the fact of a person having a particular status, *e. g.*, of legitimacy, but also all the legal effects of such status, ought to be everywhere determined by the law of his domicil. If, for example, *A* is legitimate under the law of his Scotch domicil on account of his parents having married after his birth, he not only ought to be considered legitimate in England, but ought also (though he would be illegitimate according to English local law) to possess in England all the privileges of legitimacy, both as to the inheritance of real estate and otherwise.

A person's civil status, in short, ought, on this view, to be "governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil status."³

This principle has never been fully accepted by our Courts, though of recent years they have shown a marked inclination to adopt it.⁴

¹ Savigny, s. 362, *Guthrie's transl.*, 2nd ed., p. 148. [See American Notes under chap. ii.]

² Compare Rule 134, p. 497, *post*.

³ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 457, per Lord Westbury; *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1.

⁴ The verbal admission of the correctness of this principle has been combined with the practical refusal to adopt it by means of considering features in a

Second view. No status conferred only by the law of a person's domicile is to be recognised as regards transactions taking place in another country.

This view is, in its most extreme form, the exact opposite of the first theory. If it were completely carried out, it would make status a matter purely of local law. No civilised state has ever fully adopted it, and English Courts have certainly never gone the length of applying it, at any rate in its full extent, to the status of persons domiciled in England; and a comparison of more or less recent cases¹ exhibits a distinct and increasing tendency on the part of English Courts to approximate in practice to the theory that a person's status is governed by his *lex domicilii*. Eminent writers have, however, held that the view now under consideration was at one time adopted by English law with regard to the status of persons domiciled in a foreign country.²

Third view. The existence, at any rate, of a status imposed by the law of a person's domicile ought in general to be recognised

legal transaction, which in fact involve questions of status, as belonging to the form of the transaction, and therefore as depending on the *lex loci contractus*, or, in more general terms, on the *lex actus*, or law of the country where the transaction takes place. Thus, the necessity for the consent of parents to the marriage of a minor has been treated as belonging to the formalities of the marriage (*Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1).

Those countries which, like Italy, wholly disconnect status and domicile by making personal condition depend, not upon domicile, but upon nationality or allegiance (*Codice Civile del Regno d'Italia*, Art. 6), adopt a view which at bottom is not very dissimilar from the first view, which we may call that of Savigny, since, though differing from him as to the test by which to determine what is the country to which an individual belongs, they agree with him in holding that a person's status under the law of the country to which he belongs ought to be his status in every other country.

¹ *In re Goodman's Trusts*, 1881, 17 Ch. D. (C. A.) 266; *Goodman v. Goodman*, 1862, 3 Giff. 643; *Boyes v. Bedale*, 1863, 1 H. & M. 798; 33 L. J. Ch. 283; *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1; *Simonin v. Mallac*, 1860, 2 Sw. & Tr. 67; 29 L. J. P. & M. 97.

Contrast with the present state of things the statement of Westlake in the first edition of his work on *Private International Law*: "While the English law remains as it is, it must, on principle, be taken as excluding, in the case of transactions having their seat here, not only a foreign age of majority, but also all foreign determination of status or capacity, whether made by law or by judicial act, since no difference can be established between the cases, nor does any exist on the continent." *Westlake*, 1st ed., s. 402, p. 384. This language, which does not re-appear in the later editions of Mr. Westlake's work, accurately represented English law as it existed in 1858, but does not represent English law as it exists at the present day; it has been greatly modified by the judicial decisions of the last thirty-six or thirty-seven years.

² See *Westlake*, 1st ed., s. 402, and compare *Story*, s. 98.

in other countries, though the Courts of such countries may exercise their discretion in giving operation to the results or effects of such status.

This is the principle (if so it can be called) which is meant to be stated in Rule 124,¹ and which, it is conceived, most nearly corresponds with the actual practice of our Courts. It constitutes a kind of practical compromise between the first and the second views,² and enables the Courts to recognise the existence of a status acquired under the law of a person's domicile, while avoiding the practical difficulties which arise from subjecting legal transactions to rules of law which may be unknown in the country where the transaction takes place.

The operation of Rule 124 may be thus illustrated : —

The son of a father domiciled in France is legitimate, according to the law of France, in consequence of the marriage of his parents after his birth. His legitimacy is certainly for some purposes recognised by English Courts.³ On the other hand, he is not allowed by English tribunals the whole of the advantages which, had he been born after his parents' marriage, would have accrued to him under English law as his father's heir, for he is not allowed to succeed to English real estate.⁴

So, again, a person's appointment as guardian of a minor under the minor's *lex domicilii* is certainly recognised as a fact by

¹ See p. 478, *ante*.

² This principle comes very near to the opinion of some jurists that a distinction ought to be made between the existence of a status — for example, minority — and the legal results or effects of it, and that, while the existence of the status ought to be determined wholly by the law of the person's domicile, the extent to which effect should be given in other countries to the results of such status, *e. g.*, to the minor's incapacity to contract, depends upon other laws, as, for example, the *lex loci contractus*, or the law of the place where the contract is made. As a speculative view, this opinion is obviously open to criticism, but its inconsistency represents in a theoretical form the difficulty which the law Courts of any country are certain to feel in practice of either, on the one hand, referring questions of status wholly to the *lex domicilii*, or, on the other hand, entirely refusing recognition to personal conditions imposed by the law of a person's domicile.

The great practical inconvenience of holding that a man of 24 who enters into a contract in England is not bound by it here, because by the law of his foreign domicile he is a minor, may be taken as one illustration of the difficulty of carrying out to the full the principle that status depends upon the law of domicile.

See, as to the difference between the recognition and the enforcement of a right, Intro., p. 30, *ante*.

³ *Skottowe v. Young*, 1871, L. R. 11 Eq. 474.

⁴ Rule 134, p. 497, *post*.

English judges,¹ but it cannot be said that the powers of a foreign guardian are, as such, recognised in England.²

When the bearing of our Rule is understood, two points with regard to it become apparent.

The Rule, in the first place, though it is all which can be extracted by way of principle from decided cases, is seen to be so vague as to be of comparatively little use for practical purposes. The fact that the existence of a particular status under a person's *lex domicilii* is generally recognised does not answer the important question how far the capacities or incapacities of an individual under the law, for example, of his French domicile, will be allowed by English Courts to affect transactions in England. The answer to this inquiry (as far as in the dearth of authorities it can be given at all) must be sought for in the rules deducible from English decisions with regard to the recognition to be given to particular kinds of personal condition or status.³

The Rule, in the second place, applies to two different classes of cases, that is to say, to cases in which English Courts have to consider the effect to be given to an English status as regards transactions taking place out of England, and to cases in which English Courts have to consider the effect to be given to a foreign status as regards transactions taking place in England.

When, however, the decisions as to particular kinds of status are examined, it will be found that they throw, comparatively speaking, little light on the answer to the question what are the limits within which our Courts will recognise the effect of an English status on transactions taking place abroad. We may probably, indeed, conclude that their inclination will be to give effect to an English status as regards transactions in a foreign country; thus, a married man domiciled in England is, under the English law, guilty of bigamy if he marries in a foreign country where he is not domiciled, even after he has obtained a divorce from the Courts of that country.⁴ A person domiciled in England is incapable of marrying his deceased wife's sister, and cannot rid himself of his incapacity by marrying in a country where such marriage is lawful;⁵ and a person who, being domiciled at birth

¹ See *Nugent v. Vetsera*, 1886, L. R. 2 Eq. 704; *Di Savini v. Lousada*, 1870, 18 W. R. 425.

² *Stuart v. Bute*, 1861, 9 H. L. C. 440. See Rules 130-132, pp. 493-496, *post*.

³ Rule 122, p. 474, *ante*, must always be borne in mind. It denies any effect as regards transactions in England to whole classes of personal conditions, *e. g.*, slavery.

⁴ *Lolley's Case*, 1812, 2 Cl. & F. 567 (n).

⁵ *Brook v. Brook*, 1861, 9 H. L. C. 193, and chap. xxvi., Rules 169, 170, pp. 626, 642, *post*.

in England, is born out of lawful wedlock is incapable of legitimation under the law of a foreign country.¹ On the other hand, the tendency of our Courts is to hold that, as regards at any rate capacity to contract, the effect of an English status is, even in the case of a domiciled Englishman, overridden by the law of the country where the contract is made.²

The decisions throw more light on the answer to the inquiry, what are the limits within which our Courts will recognise the effect of a foreign status on transactions taking place in England, and make it possible to lay down in several cases Rules, with regard to the effect of a foreign status,³ which may be considered to be applications of Rule 124.

¹ *Re Wright's Trusts*, 1856, 25 L. J. (Ch.) 621 ; 2 K. & J. 595.

² See Exception 1, p. 546, to Rule 146, *post* ; 2 *Fraser, Treatise on Husband and Wife*, 2nd ed., pp. 1317, 1318.

³ See chaps. xix., xx., *post*.

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SEE American Notes under chaps. xvi., xxiv., and xxvi. See also, *Van Matre* v. *Sankey*, 148 Ill. 536 ; 36 N. E. 628.

CHAPTER XIX.

STATUS OF CORPORATIONS.¹

RULE 125.²—The existence of a foreign corporation duly created under the law of a foreign country is recognised by the Court.

Comment.

The principle is now well established that a corporation duly created in one country is recognised as a corporation by other countries. Thus it is a matter of daily experience that foreign corporations sue and are sued in their corporate capacity before English tribunals.

RULE 126.³—The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country where the transaction occurs.

Comment.

The power or capacity of a corporation is limited in a twofold manner.

First. Its capacity is limited by its constitution. A corporation, for example, which is prohibited by its constitution from the purchase of land, has no power to effect a valid purchase of land in any country; for the corporation exists as such only by virtue of its constitution, and any acts done in contravention of its constitution by its directors or others are *ultra vires*, and in strictness not the acts of the corporation.

Secondly. Its capacity is limited by the law of the country where a given transaction takes place. It cannot do any act forbidden by the law of such country.

¹ As to Foreign Corporations, see *Lindley, Company Law*, 5th ed., Appendix No. 1; *Foreign Companies*, pp. 909-914; *Westlake*, 3rd ed., chap. xvi; *Foote*, 2nd ed., pp. 100, 121; *Wharton*, ss. 105, 105 d.

² See Intro., General Principle No. I., p. 22, *ante*.

³ *Lindley, Company Law*, 5th ed., p. 913.

Thus a foreign corporation authorised by its constitution to acquire and hold land cannot hold land in England in contravention of the Mortmain Acts.

Similarly an English corporation empowered by its terms of association to purchase land, work mines, etc., in a foreign country, cannot obtain land in a colony or other foreign country if the holding of land by a corporation is prohibited by the laws of such foreign country.

Practically the most important question which arises "with reference to foreign companies relates to the personal liabilities of their members. If a company is incorporated by a foreign government, so that by the constitution of the company the members are rendered wholly irresponsible, or only to a limited extent responsible, for the debts and engagements of the company, the liability of the members, as such, will be the same in [England] as in the country which created the corporation.¹ But, with respect to unincorporated companies, the measure of liability in respect of any given transaction seems, upon principle, to depend upon the law of the place where the transactions in question occurred (*lex loci contractus*). The law of agency, as administered in that place, would, it is conceived, have to be applied; and the law of the place where the company might be considered as domiciled would only be material for the purpose of determining the authority given by the members to the agents by whom the transactions in question were conducted."²

¹ *General Steam Navigation Co. v. Guillou*, 1843, 11 M. & W. 877.

² *Lindley, Company Law*, 5th ed., pp. 913, 914. See *Maunder v. Lloyd*, 1862, 2 J. & H. 718; *Story*, s. 320 a; and Rule 168, p. 618, *post*.

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By "the law of comity among nations, a corporation created by one sovereign is permitted to make contracts in another," and to sue and be sued in its Courts; and this rule prevails in the United States, and between the States thereof. *Bank of Augusta v. Earle*, 13 Pet. 519; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 529; *Société Foncière v. Milliken*, 135 U. S. 304; 10 Sup. Ct. 823; *Lancaster v. A. I. Co.* 140 N. Y. 576; 35 N. E. 964; *Wilson v. Martin-Wilson Fire Alarm Co.* 149 Mass. 24; 20 N. E. 318; *Watson v. Richmond & D. R. Co.* 91 Ga. 222; 18 S. E. 306; *A., T. & S. F. R. Co. v. Fletcher*, 35 Kan. 236; *Taylor v. Trust Co.* 71 Miss. 694; 15 So. 121; *The Missouri Lead M. & S. Co. v. Reinhard*, 114 Mo. 218; *Cone Company v. Poole*, 41 S. C. 70; 19 S. E. 203; *Lyle v. Custead*, 4 Tex. Civ. App. 490; 23 S. W. 451; *Humphreys v. Newport News & M. V. Co.* 33 W. Va. 135; 10 S. E. 39. Citizens of one State may organise a corporation under the laws of another State for the purpose of doing business in the former. *Lancaster v. A. I. Co.* 140 N. Y. 576; 35 N. E. 964; *Oakdale Mfg. Co. v. Garst* (R. I.), 28 Atl. 973; *Bank v. Hall*, 35 Ohio St. 158; *Danforth v. Penny*, 3 Met. (Mass.) 564. *Contra, Hill v. Beach*, 12 N. J. Eq. 31 (1858). See 26 Am. Law Rev. 342. But the rule of comity does not extend to a foreign corporation which is by its charter forbidden to do business in the State of its origin. *Land Grant Railway v. Courts of Coffey County*, 6 Kan. 245. See, generally, 40 Cent. Law J. 383; 47 Am. & Eng. Corp. Cas. 519; 10 Am. R. & Corp. R. 621.

As to what constitutes "doing business," see *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *Reeves v. Harper*, 43 La. An. 516; *Scruggs v. Scottish Mortgage Co.* 54 Ark. 566; *Bertha Zinc & Mineral Co. v. Clute*, 7 Misc. Rep. 123; 27 N. Y. Supp. 342; *Murfree on Foreign Corporations*, ss. 65-73. One who deals with a foreign corporation is estopped to deny its right to do business. *Lancaster v. A. I. Co.* 140 N. Y. 576; 35 N. E. 964; *Galveston Land & Imp. Co. v. Perkins* (Tex. Civ. App.), 26 S. W. 256; *Fire Engine Co. v. Town of Mt. Vernon*, 9 Wash. St. 142.

The capacity of a foreign corporation is determined by its charter. *Bank of Augusta v. Earle*, 13 Pet. 588; *Relf v. Rundle*, 103 U. S. 226; *St. Louis Railroad v. Terre Haute Railroad*, 145 U. S. 393; 12 Sup. Ct. 953; *Lancaster v. A. I. Co.* 140 N. Y. 576; *Riley v. Diggs*, 2 Demarest (N. Y.), 184; *Rue v. Railway Co.* 74 Tex. 475; 8 S. W. 533. But the validity of its acts is determinable by the *lex loci* where the latter properly governs. *Runyan v. Coster's Lessee*, 14 Pet. 122; *Bard v. Poole*, 12 N. Y. 495; *Rothrock v. Dwelling-house Ins. Co.* 161 Mass. 423; 37 N. E. 206. A statute, however, which in general terms forbids corporations to do certain things, is not necessarily applicable to foreign corporations. *Vanderpoel v. Gorman*, 140 N. Y. 563; 35 N. E. 923. In

the absence of any local prohibition, a foreign corporation may acquire and convey land. *Lancaster v. A. I. Co.* 140 N. Y. 576 ; 35 N. E. 964 ; *Taylor v. Trust Co.* 71 Miss. 694 ; 15 So. 121 ; *Missouri L. M. & S. Co. v. Reinhard*, 114 Mo. 218 ; 21 S. W. 488. See also, 35 Cent. Law J. 166 ; *American Mortgage Co. v. Tennessee*, 87 Ga. 28 ; *Carlow v. C. Aultman & Co.* (Neb.) 44 N. W. 873.

Whilst, in the absence of any prohibition, it is presumed that a foreign corporation may exercise the powers conferred by its charter, *Christian Union v. Yount*, 101 U. S. 352 ; yet it may be altogether excluded, or may be admitted on such terms and conditions as the State may think proper to impose, *Paul v. Virginia*, 8 Wall. 168, 181 ; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181 ; *Boston Investment Co. v. Boston*, 158 Mass. 461 ; *Fawcett v. Iron Hall*, 64 Conn. 170 ; 29 Atl. 614 ; *Pennsylvania Co. for Ins. on Lives v. Bauerle*, 143 Ill. 459 ; *People v. Pavey*, 151 Ill. 101 ; 37 N. E. 691 ; *Home Ins. Co. v. Davis*, 29 Mich. 238 ; *W. U. Tel. Co. v. Mayer*, 28 Ohio St. 521 ; *State v. Ackerman* (Ohio Sup.), 37 N. E. 828 ; provided that the limitation imposed on the right to contract does not invade the exclusive power of Congress to regulate commerce among the several States, *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 734 ; *Horn Silver Mining Co. v. New York*, 143 U. S. 305. But, if admitted, the foreign corporation must, in the absence of legislation equivalent to making it a domestic corporation, "be taken, both by the government and those who "deal with it, as a creature of the law of its own country, and subject to all "the legislative control and direction that may be properly exercised over it "at the place of its creation." *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 537.

Whether the failure of a foreign corporation to comply with the conditions prescribed for admission to do business avoids contracts made by it is a question as to which the decisions are conflicting. Where penalties are prescribed for such failure, it is the rule to treat them as exclusive ; and it should not be implied that contracts are void if the object of the statute can be otherwise attained. *Morawetz on Private Corporations*, ss. 665, 666. For decisions sustaining the validity of contracts, see *Gamble v. Caldwell*, 98 Ala. 577 ; *Lumber Co. v. Improvement Asso.* 55 Ark. 625 ; 18 S. W. 1055 ; *C. B. Rogers & Co. Corp. v. Simmons*, 155 Mass. 259 ; 29 N. E. 580 ; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727 ; *Marshall v. Reading Fire Ins. Co.* 78 Hun, 83 ; 29 N. Y. Supp. 334 ; *Toledo T. & L. Co. v. Thomas*, 33 W. Va. 566 ; 11 S. W. 37 ; *Middlebrook v. Daniel Bradley Mfg. Co.* (Tex. Civ. App.) 27 S. W. 169 ; *Kindel v. Beck & Pauli Lithographic Co.* (Colo.) 35 Pac. 538 ; *Fire Engine Co. v. Town of Mt. Vernon*, 9 Wash. 142 ; 37 Pac. 287 ; *Wright v. Lee* (S. Dak.), 51 N. W. 706. *Contra*, *Farrior v. New England Mortgage Security Co.* 88 Ala. 275 ; 7 So. 200 ; *Seamans v. Zimmerman* (Iowa), 59 N. W. 290 ; *Reliance Mut. Ins. Co. v. Sawyer*, 160 Mass. 413 ; 36 N. E. 59 ; *Lombard Lumber Co. v. Thomas*, 92 Tenn. 587. See *Pennsylvania Co. for Ins. of Lives v. Bauerle*, 143 Ill. 459.

The liability of foreign corporations to suit is limited in New York by the provision that such corporations cannot be sued by a non-resident on a cause of action that arose out of the State ; and this provision is applicable to a non-resident who has been appointed administrator under the laws of New York. *Robinson v. Oceanic Steam Nav. Co.* 112 N. Y. 315 ; 19 N. E. 625 ; *Childs v. Harris Mfg. Co.* 104 N. Y. 477 ; *Gundlin v. Hamburg Am. Packet Co.* 31 Abb. N. Cas. 437 ; 28 N. Y. Supp. 572 ; *Colorado State Bank v. Gallagher*, 76 Hun, 310 ; 27 N. Y. Supp. 688 ; *Robeson v. Cent. R. R. of N. J.* 76 Hun, 444 ; 28 N. Y. Supp. 104. See *Fidelity Mutual Life Asso. v. Ficklin*, 74 Md. 172.

See, generally, as to suits by and against foreign corporations, *Thompson, Commentaries on the Law of Corporations*, titles xviii., xix.; *Holland v. Mobile & Ohio R. R. Co.* 16 Lea (Tenn.), 414; *Toronto Gen. Trust Co. v. C., B., & Q. R. R. Co.* 123 N. Y. 37; *Baltimore & Ohio R. R. Co. v. Adams Express Co.* 22 Fed. Rep. 404; *Rehm v. German Ins. & Sav. Inst.* (Ind.) 25 N. E. 173; *Henry v. Stuart*, 14 Phila. 110; *Central R. R. & Banking Co. v. Carr*, 76 Ala. 388; 52 Am. Rep. 339; *Crouse v. Insurance Co.* 56 Conn. 176.

It is essential to the maintenance of a suit against a foreign corporation that it should have been duly served with process within the jurisdiction, or that it should have voluntarily appeared in the action. *St. Clair v. Cox*, 106 U. S. 350; *Fitzgerald Const. Co. v. Fitzgerald*, 137 U. S. 98; 11 Sup. Ct. 36; *Ambler v. Archer*, 1 App. D. C. 94; *Mex. Cent. Railway v. Pinkney*, 149 Mass. 194; *Rothrock v. Dwelling-house Ins. Co.* 161 Mass. 423; 37 N. E. 206; *McLaren v. Byrnes*, 80 Mich. 275; *Hester v. Rasin Fertilizer Co.* 33 S. C. 609; 12 S. E. 563. Process may be served on the local agent representing the corporation in the jurisdiction within which the suit is brought. *Société Foncière v. Milliken*, 135 U. S. 304. See *Morawetz on Private Corporations*, 2nd ed., ss. 979-983. Debts due from foreign corporations, or interests in the stock of such corporations, held by non-residents, are not attachable in New York. *Douglass v. P. Ins. Co.* 138 N. Y. 209; 33 N. E. 938.

In regard to the enforcement of the personal liability of a resident stockholder of a foreign corporation, the following rules are observed: if such liability rests in contract merely, it will be enforced everywhere; if it grows out of a statute of the State to which the corporation belongs, its enforcement, though a matter of comity, will generally be conceded if the liability is in its nature contractual; but its enforcement will not be conceded if the statute is in its nature penal. As to what constitutes a penal statute, see *Huntington v. Atrill*, 146 U. S. 657; *Flash v. Conn.*, 109 U. S. 371. Where the statute creating the liability also prescribes a remedy for its enforcement, it is frequently held that such remedy is exclusive, and can be pursued only before the tribunals of the State by which the law was enacted. For an able and exhaustive examination of this subject, see 3 *Thompson's Commentaries on the Law of Corporations*, ss. 3050-3064. A creditor of a corporation, who has obtained a judgment against it in the State of its domicile, cannot, after the corporation has ceased to do business, maintain a bill in equity against a shareholder in another State for the amount of his unpaid subscription to the stock. *Patterson v. Lynde*, 112 Ill. 196.

CHAPTER XX.

FAMILY RELATIONS.

(A) HUSBAND AND WIFE.

RULE 127.¹ — The authority of a husband as regards the person of his wife while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England.²

Comment.

The question, what amount of control a husband may exercise over the freedom of his wife, and what amount of force (if any) he may use in controlling her, must be answered with reference to the law of the place where they are residing.

Our Courts certainly would not allow a foreigner, when in England, whatever might be his domicile, to exercise over his wife any power which might not be lawfully exercised by an Englishman. It seems, also, that a foreigner, resident with his wife in England, may, though not domiciled here, apply to our Courts for restitution of conjugal rights.³

(B) PARENT AND CHILD.⁴

RULE 128.⁵ — The authority of a parent as regards the person of his child while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England.

¹ See *Wharton*, s. 120; *Polydore v. Prince* (Am.), Ware, 402; *Phillimore*, s. 486. As to effect of marriage on property of husband and wife, see in reference to immovables, Rule 138, p. 516, *post*, and to movables, Rules 171-173, pp. 648-655, *post*.

² As to meaning of law of England, see pp. 75-77, *ante*.

³ See *Connelly v. Connelly*, 1851, 7 Moore P. C. 438.

⁴ See *Story*, s. 463 a; *Westlake*, 3rd ed., p. 48; *Phillimore*, ss. 522-531; *Wharton*, ss. 253, 254.

⁵ See *Johnstone v. Beattie*, 1843, 10 Cl. & F. 42, 114; *Nugent v. Vetsera*, 1866, L. R. 2 Eq. 704.

Comment.

By the law of England, the parental authority of a foreign father over his child is recognised, but "the authority so recognised is only that which exists by the law of England. If, by the law of the country to which the parties belonged, the authority of the father was much more extensive and arbitrary than in this country, is it supposed that the father would be permitted here to transgress the power which the law of this country allows? If not, then the law of this country regulates the authority of the parent of a foreign child living in England, by the laws of England, and not by the laws of the country to which the child belongs."¹

A Frenchman, domiciled in France, is travelling in England with his son 10 years old. He flogs the child for some fault. Whatever the laws of France, the father's authority to administer such punishment cannot be questioned in an English Court, since he has not exceeded the limits of authority recognised by English law. If, again, the French father, in punishing his son, exceeds the limits of what is deemed by English law reasonable chastisement when inflicted by an English parent, he cannot justify his conduct here by showing that the punishment is allowed by French law.

RULE 129.²—The rights of a parent domiciled in a foreign country over the movables in England belonging to a minor are, possibly, governed by the law of the parent's domicile, but are more probably governed, while the minor is in England, by the law of England.

Comment.

There is little or no authority (except one case) as to a foreign father's rights in respect of the movables of a minor. The tendency of English law to follow the maxim, *mobilia sequuntur personam*, rather favours the view that the parent's rights may depend on the *lex domicilii*. But the case itself³ is not decisive. *H*, an Englishman domiciled in Holland, married *W* in Holland, where *W* was then domiciled. Under the marriage settlement

¹ *Johnstone v. Beattie*, 1843, 10 Cl. & F. 42, 114.

² *Gambier v. Gambier*, 1835, 7 Sim. Rep. 263. As to immovables, see Rule 138, p. 516, *post*.

³ *Ibid*.

of *W*, and a subsequent judicial compromise in Holland, their children became, on *W*'s death, entitled to one fourth of certain property of *W*'s in the public funds. By the Code Napoléon, which is the law of Holland, a surviving parent has, while children are under the age of 18, the enjoyment of their property. *H* and *W* removed to, and became domiciled in England, and had children born to them there. *W* died, and, the children being under 18, the question arose as to *H*'s rights in respect of their property in the English funds. It was held that *H* had no right to it.

The grounds of the decision were thus explained : —

“By the Code Napoléon, which is the law of Holland as well as of France, when children are under the age of 18 their surviving parent has the enjoyment of their property until they attain that age. *But that is nothing more than a mere local right, given to the surviving parent, by the law of a particular country, so long as the children remain subject to that law ; and, as soon as the children are in a country where that law is not in force, their rights must be determined by the law of the country where they happen to be. These children were never subject to the law of Holland ; they were both born in this country, and have resided there ever since.* The consequence is, that this judicial decree has adjudged certain property to belong to two British-born subjects domiciled in this country, and, so long as they are domiciled in this country, their personal property must be administered according to the law of this country. *The claim of their father does not arise by virtue of the contract, but solely by the local law of the country where he was residing at the time of his marriage ; and therefore this property must be considered just as if it had been an English legacy given to the children ; and all that the father is entitled to is the usual reference to the Master, to inquire what allowance ought to be made to him for the past and future maintenance of his children.*”¹

All the parties were domiciled in England, and therefore the case may have been decided on the ground of domicile ; but the expressions in the judgment seem to imply that the rights of the children were to be determined by the law, not of the domicile, but of the country where they happened to be, which in this case was England, although the same country was, as it chanced, that of their domicile.

¹ *Gambier v. Gambier*, 1835, 7 Sim. 263, 270, per *Shadwell*, V. C.

(C) GUARDIAN AND WARD.¹

RULE 130.²—A guardian appointed under the law of a foreign country (called hereinafter a foreign guardian) has no direct authority as guardian in England; but the Court recognises³ the existence of a foreign guardianship, and may, in its discretion, give effect to a foreign guardian's authority over his ward.

Comment.

A foreign guardian has, as such, no rights in England. Guardianship is considered by our Courts as an institution existing under the local law of the country where the guardian is appointed, and as being, in fact, part of the administrative law of that country. The rights, therefore, of a guardian are considered not to extend beyond the limits of the country where he receives his appointment. Hence a Scotch guardian appointed in Scotland has (it has been held⁴) no authority in England.

"Foreign tutors and curators . . . cannot be English guardians without being able to derive their authority from some one of those sources from which the English law considers that the right of guardianship must proceed; and it has before been shown that the rights and duties of a foreign tutor and curator cannot be recognised by the Courts of this country with reference to a child residing in this country. The result is, that such foreign tutor and curator can have no right, as such, in this country; and this so necessarily follows from reason, and from the rules which regulate in this respect the practice of the Court of Chancery, that it could not be expected that any authority upon the subject would be found."⁵

The effect of this language is, it is true, modified by expressions used in a later case,⁶ but it still expresses the principle of English law. Hence, in spite of the existence of foreign guardians, other

¹ *Nugent v. Vetzera*, 1866, L. R. 2 Eq. 704; *Stuart v. Bute*, 1861, 9 H. L. C. 440; *Di Savini v. Lousada*, 1870, 18 W. R. 425; *Johnstone v. Beattie*, 1843, 10 Cl. & F. 42; *Story*, ss. 499, 499 a; *Phillimore*, ss. 543-553 a.

² *Ibid.*

³ As to difference between "recognition" and "enforcement" of rights, see Intro., pp. 30, 31, *ante*.

⁴ *Johnstone v. Beattie*, 1843, 10 Cl. & F. 42.

⁵ *Ibid.*, p. 114, per Lord Cottenham.

⁶ *Stuart v. Bute*, 1861, 9 H. L. C. 440, 470.

guardians have, on application, been appointed by our Courts;¹ foreign guardians have been prevented from removing their ward out of England,² and foreign guardians who wish to exercise their powers in England must apply to the Courts to be appointed English guardians.³ Whether or not the Courts will give them authority is a matter of discretion, though the fact of the applicants being foreign guardians is of great weight in determining into whose custody the ward shall be committed.⁴

For the Courts in modern times certainly do recognise the existence of the foreign guardianship. Hence where two infants, Austrian subjects, were sent to England for education, the Court of Chancery refused to interfere with the discretion of the guardian, appointed by an Austrian Court of competent jurisdiction, when he wished to remove them from England in order to complete their education in Austria; but, English guardians having been already appointed, the Court refused to discharge the order by which they were appointed, and merely reserved to the foreign guardian the exclusive custody of the children to which he was entitled by the order of the foreign Court.⁵ The principles which guided the Court were explained as follows:—

“I am now asked in effect to set aside the order of the Austrian Court, and declare that this gentleman so appointed cannot recall his wards who have been sent to this country for the purpose of their education. It would be fraught with consequences of very serious difficulty, and contrary to all principles of right and justice, if this Court were to hold that when a parent or guardian (for a guardian stands exactly in the same position as a parent) in a foreign country avails himself of the opportunity for education afforded by this country, and sends his children over here, he must do it at the risk of never being able to recall them, because this Court might be of opinion that an English course of education is better than that adopted in the country to which they belong. I cannot conceive anything more startling than such a notion, which would involve, on the other hand, this result, that an English ward could not be sent to France for his holidays without the risk of his being kept there and educated in the Roman Catholic religion, with no power to the

¹ *Johnstone v. Beattie*, 1843, 10 Cl. & F. 42; *Nugent v. Vetzera*, 1866, L. R. 2 Eq. 704.

² *Dawson v. Jay*, 1854, 3 De G. M. & G. 764.

³ See *Story*, s. 499 a.

⁴ *Ibid.*

⁵ *Nugent v. Vetzera*, 1866, L. R. 2 Eq. 704.

“father or guardian to recall the child. Surely such a state of jurisprudence would put an end to all interchange of friendship between civilised communities. What I have before me is nothing more or less than that case.

“With respect to the English guardians of these children, I hold that the Court has power to appoint them, and I continue those that have been appointed. The case may well happen of foreign children in this country without any one to look after or care for them, or who may require the protection of this Court to save them from being robbed and despoiled by those who ought to protect them. These children, on the other hand, seem to have met with nothing but kindness from their relations on all sides; but it may be desirable that, so long as they remain in this country, they should have the protection of guardians living within the jurisdiction. Out of respect to the authority of the Austrian Courts, by which this gentleman has been appointed, I reserve to him, in the order I am about to make, all such power and control as might have been exercised over these children in their own country if they were there, and had not been sent to England for a temporary purpose. Taking that view of the case, I have not asked to see the children. I could not be influenced by anything I might hear from them. I assume that they are most anxious to remain here, and not to go back to their own country; but I have no right to deprive the guardian appointed by the foreign Court over them of the control which he has lawfully and properly acquired, has never relinquished and never abandoned, and under which authority alone they have remained here and been maintained and supported here.”²

Where an Italian Court had appointed guardians for an Italian infant, who came to England, and, being made a ward in Chancery, was, with the consent of the Italian guardians, placed in the custody of English guardians, who did not carry out the directions of the Italian guardians, the Court of Chancery, upon the application of the Italian Court, appointed new guardians, and declared its readiness to carry out in all respects the orders of the Italian Courts with regard to the infant, so far as might be consistent with the laws of England.³

The position, however, in England of foreign guardians is a subject on which it is difficult to lay down precise rules, both

¹ *Nugent v. Vetsera*, 1866, L. R. 2 Eq. 704, 712, per *Wood*, V. C.

² *Ibid.*, 714, 715, per *Wood*, V. C.

³ *Di Savini v. Lousada*, 1870, 18 W. R. 425.

because in all matters of guardianship the High Court acts mainly on its discretion and with reference to the particular circumstances of each case, and because the later decisions involve a recognition of foreign guardianship not in reality consistent with the doctrine of the earlier cases that the powers of guardians are strictly local.

The authority of a guardian who is not appointed by the Courts of the foreign infant's domicile (*e. g.*, of a guardian appointed by a French Court for an Italian infant) will, it is conceived, not be recognised in England.

RULE 131.¹— A foreign guardian has, unless interfered with by the Court, control over the person of his ward while in England.

Comment.

An Italian guardian brings his ward, also an Italian, to England. The guardian takes his ward out of England. He acts legally, and does not expose himself to any legal proceedings for removing his ward.

RULE 132.²— A foreign guardian cannot dispose of movables situate in England belonging to his ward (?).

Comment.

A French guardian of a French minor sells to *M* goods belonging to such minor which are situate in England. The guardian cannot (semble) give a good title to the goods, and by selling them may possibly expose himself to an action for conversion.

(D) LEGITIMACY.³

RULE 133.— A child born anywhere in lawful wedlock is legitimate.

¹ *Nugent v. Vetsera*, 1866, L. R. 2 Eq. 704. A foreign guardian cannot exercise in England any powers over his ward which could not be exercised by an English guardian. See language of Lord Cottenham in *Johnstone v. Beattie*, 1843, 10 Cl. & F. 42, 113, 114; contrast language of *Wood, V. C.*, L. R. 2 Eq. 714.

² *Story*, 504 *a*. See American cases cited, *Story*, s. 504 *a*, note 4, and observations of *Wood, V. C.*, in *Scott v. Beniley*, 1855, 1 K. & J. 281, 284.

³ See *Story*, ss. 87 *a*, 93–93 *w*, 105–106; *Westlake*, 3rd ed., pp. 88–92; *Phillimore*, ss. 532–542; *Wharton*, ss. 240–250; *Savigny, Guthrie's transl.*, s. 380, pp. 302, 308–317. See App., Note 11, *Legitimation*.

Comment.

If any dispute arises as to the legitimacy of a child ostensibly born in lawful wedlock, it will be found that the matter in dispute is not the soundness of Rule 133, but either the validity of the marriage,¹ or the fact of the child being born in wedlock. The principle itself, expressed in the Rule, is beyond dispute.

RULE 134. — The law of the father's domicile at the time of the birth² of a child born out of lawful wedlock, and the law of the father's domicile at the time of the subsequent marriage³ of the child's parents, determine whether the child becomes, or may become, legitimate in consequence of the subsequent marriage of the parents (*legitimatio per subsequens matrimonium*).

Case 1. — If both the law of the father's domicile at the time of the birth of the child and the law of the father's domicile at the time of the subsequent marriage allow of *legitimatio per subsequens matrimonium*, the child becomes, or may become,⁴ legitimate on the marriage of the parents.⁵

Case 2. — If the law of the father's domicile at the time of the birth of the child does not allow of *legitimatio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents.⁶

¹ See as to Validity of Marriage, chap. xxvi., Rules 169, 170, pp. 626, 642, *post*.

² *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441; *Re Wright's Trusts*, 1856, 2 K. & J. 595; 25 L. J. Ch. 621.

³ *Vaucher v. Solicitor to Treasury*, 1888, 40 Ch. D. (C. A.) 216.

⁴ It is not certain that he will become legitimate on the marriage of his parents, since the law of the country where the father is then domiciled may for the purpose of legitimation require something more than the marriage; it may, for example, require that the father should go through some additional ceremony or formality, or that he should not, between the child's birth and the subsequent marriage with the child's mother, have been married to any other woman.

⁵ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441; *Re Wright's Trusts*, 1856, 2 K. & J. 595, 25 L. J. Ch. 621; *Vaucher v. Solicitor to Treasury*, *In re Grove*, 1888, 40 Ch. D. (C. A.) 216.

⁶ *Re Wright's Trusts*, 1856, 2 K. & J. 595; 25 L. J. Ch. 621; *Shedden v.*

Case 3.—If the law of the father's domicile at the time of the subsequent marriage of the child's parents does not allow of *legitimatio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents.¹

Provided that a person born out of lawful wedlock cannot be heir to English real estate, nor can any one, except his issue, inherit English real estate from him.²

Comment and Illustrations.

According to the law of England, of the Northern States of America, and of all countries governed by the English common law, a child born before the marriage of his parents cannot be legitimated by their subsequent marriage. According to the law of Scotland, of France, and of most countries which have adopted, or have been influenced by, the law of Rome, such a child is or may be legitimated by the subsequent marriage of the parents. These countries, in short, allow what is technically known as *legitimatio per subsequens matrimonium*.³

Patrick, 1854, 1 Macq. 535; *Munro v. Saunders*, 1832, 6 Bli. 468; *Dalhousie v. M'Douall*, 1840, 7 Cl. & F. 817; *Munro v. Munro*, 1840, 7 Cl. & F., 842.

¹ *Vaucher v. Solicitor to Treasury*, 1888, 40 Ch. D. (C. A.) 216. As to meaning of "marriage," see chap. xxvi., Rule 169, p. 626, *post*.

² *Birtwhistle v. Vardill*, 1835, 2 Cl. & F. 571; *In re Don's Estate*, 1857, 4 Drew. 194; 27 L. J. Ch. 98.

The principle of this proviso applies when the child is the offspring of the marriage between a man and his deceased wife's sister. Such a marriage, when celebrated in a country such as Denmark, by Danish subjects there domiciled, is probably valid, even in England; but the child of such a marriage cannot inherit English real estate, since it has been held that in order "to inherit land it is not enough to be the issue of married parents, but it "is also necessary to be the issue of parents who would have been married if "they had gone through the ceremony of marriage in the country where the "land lies." (*Fenton v. Livingstone*, 1859, 3 Macq. 497, and opinion of J. Westlake, *Parliamentary Paper*, No. 145, 3rd April, 1876.)

³ "The laws of most of the states on the continent of Europe admit this "legitimation generally, though with distinctions in respect of certain illegitimate children, or in respect of the form of the acknowledgment by the "parents. It is also the law in the law of the Isle of Man, Guernsey, and "Jersey, in Lower Canada, St. Lucia, Trinidad, Demerara, Berbice, at the "Cape of Good Hope, Ceylon, Mauritius, — as well as in North America, in "the States of Vermont, Maryland, Virginia, Georgia, Alabama, Mississippi, "Louisiana, Kentucky, Missouri, Indiana, and Ohio, — also in Scotland. In "Ireland, England, and those of its dependencies in the West Indies and

This fundamental difference of law has given rise to various questions as to the extra-territorial effect produced on the legitimacy of a child by the marriage of his parents after his birth. Whether, for example, a child born in Scotland is to be considered legitimate in England on the subsequent marriage of his parents in Scotland or England; whether a child born in England of parents domiciled in Scotland becomes legitimate on the marriage of its parents in England or in Scotland; whether regard is to be had to the place of birth or to the place of marriage; and other inquiries of the same kind, — have (in consequence of the difference between English and Scotch law) constantly come before the English Courts, or before the House of Lords sitting as a Court of appeal from Scotland.¹

After some fluctuation in the decisions, the principle stated in Rule 134 has been well established. The test whether the subsequent marriage of a child's parents can legitimate him is the law of the father's domicile at the time of the child's birth, taken in combination with the law of the father's domicile at the time of the subsequent marriage.

This principle applies to three different cases : —

Case 1. — If the law of the country, for example, Scotland, where the father is domiciled (not necessarily where he is resident) at the time of a child's birth, and also of the country, for example, France, where the father is domiciled at the time of the marriage with the child's mother, recognises *legitimitas per subsequens matrimonium*, the child, though born before the marriage of his parents, may become legitimate on their subsequent marriage. Thus, where the child's father was domiciled though not residing in Scotland at the time of the child's birth in England, it was held that the subsequent marriage of his parents, whilst the father retained his Scotch domicile, made the child legitimate.²

Case 2. — If the law of the country (for example, England or "North America which have not been named, as well as in the other States "of North America, legitimation by subsequent marriage is not admitted at "all." *Schaeffner, Entwicklung des internationalen Privatrechts*, p. 49, cited *Savigny, Guthrie's transl.*, 2nd ed., p. 308.

¹ Most of the decisions on this subject are given by the House of Lords as a Scotch Court of appeal; but it is conceived that the principles laid down, *e. g.*, in *Udny v. Udny*, may be taken as generally binding, and would be adhered to by the House of Lords when sitting as an English Court. See especially, *Vaucher v. Solicitor to Treasury, In re Grove*, 1888, 40 Ch. D. (C. A.) 216, which determines that the subsequent marriage of a child's parents does not legitimate him, if at the time of the marriage the father is domiciled in a country the law whereof does not allow of *legitimitas per subsequens matrimonium*.

² *Munro v. Munro*, 1840, 7 Cl. & F. 842.

New York) where the father is domiciled at the time of the child's birth does not allow of *legitimitas per subsequens matrimonium*, no subsequent marriage will avail to make the child legitimate.

Thus, where an Englishman, domiciled in England, had, while residing in France, a child by a Frenchwoman, herself domiciled in France, it was held that the subsequent marriage of the parents did not legitimate the child.¹ This was a particularly strong case, because the father had, after the birth of the child but before the marriage, acquired a French domicile.

Case 3. — If, lastly, the law of the country (for example, England) where the father is domiciled, at the time of the subsequent marriage with the child's mother, does not allow of *legitimitas per subsequens matrimonium*, the marriage will not avail to make the child legitimate.

Thus, where a Genevese citizen was at the time of the birth of his child domiciled at Geneva, the law whereof allowed of *legitimitas per subsequens matrimonium*, and, having afterwards obtained an English domicile, then married the child's mother, it was held that the subsequent marriage did not legitimate the child.² "In my opinion," says Cotton, L. J., "the domicile at birth must give a capacity to the child of being made legitimate; but then the domicile at the time of the marriage, which gives the status, must be domicile in a country which attributes to marriage that effect."³

The domicile of the mother is immaterial.

Thus, where a child's mother was at the time of his birth a domiciled Frenchwoman, it was distinctly laid down that "no importance can be attributed to the fact of the mother being

¹ *Re Wright's Trusts*, 1856, 25 L. J. (Ch.) 621; 2 K. & J. 595.

² *Vaucher v. Solicitor to Treasury, In re Grove*, 1888, 40 Ch. D. (C. A.) 216. This case is not, it is true, absolutely decisive, for some of the judges took the view that the father was domiciled in England, both at the time of the child's birth and at the time of his marriage with the child's mother. But the very decided expressions of opinion both by Cotton, L. J. (pp. 231-233), and by Fry, L. J. (p. 241), are nearly equivalent to a decision on the point in question.

³ *Ibid.*, p. 233, judgment of Cotton, L. J. It must be admitted that in some reported cases, e. g., *Re Wright's Trusts*, 1856, 2 K. & J. 595, 614, judgment of Page Wood, V. C.; *Munro v. Munro*, 1840, 7 Cl. & F. 842; *Udny v. Udny*, 1869, L. R. 1 Sc. Ap. 441, expressions have been used which seem to imply that judges of authority considered that the effect of a marriage subsequent to a child's birth depends wholly on the domicile of the father at the time of the birth, and that the father's domicile at the time of the marriage is immaterial, but no reported case prior to *Vaucher v. Solicitor to Treasury* required a decision as to the effect to be attributed to the law of the father's domicile at the time of the marriage.

“a Frenchwoman. A domiciled Englishman having a child before marriage in any part of the world by a woman of any other nation, the legitimacy or illegitimacy of that child must be determined by the law of his domicile.”¹ So, on the other hand, if the father is a domiciled Scotchman, the child’s capacity for being legitimated is not affected by the mother being a domiciled Englishwoman.²

The *place* of the child’s *birth* is immaterial.

It was, indeed, at one time thought that the law of the country *where the child was born* (not of the father’s domicile at the time of the birth) determined the effect of the subsequent marriage on the legitimacy of the child.³ It is, however, now settled that the place of the birth is immaterial.⁴

The *place* where the *marriage* is *celebrated* is immaterial.

A marriage celebrated in England according to the ritual of the English Church will legitimatise the children of a father domiciled in Scotland, both at the time of their birth and at the time of the subsequent marriage in England with their mother.⁵

The operation of the principle contained in the rule, under the different circumstances to which it may be applied, may be seen from the following illustrations, in each of which *F* is the father, *M* the mother, and *C* the child. It is assumed in each case that the marriage takes place after *C*’s birth. To understand these examples the reader must bear in mind that Scotch law allows, whilst English law does not allow, *legitimatío per subsequens matrimonium*.

1. *F* and *M* are domiciled in Scotland at the time of *C*’s birth. *C* is born in Scotland. *F* and *M* marry in Scotland whilst domiciled there.

C is legitimate.

2. *F* is domiciled in Scotland but *M* is domiciled in England at the time of *C*’s birth. The birth and the marriage take place in Scotland, *F* being domiciled in Scotland and *M* continuing domiciled in England at the time of the marriage.

¹ *Re Wright’s Trusts*, 1856, 2 K. & J. 595, 610, per *Page Wood*, V. C.

² *Munro v. Munro*, 1840, 7 Cl. & F. 842. That the domicile of the mother should have no effect is rather remarkable. From the fact that an illegitimate child derives his domicile of origin from his mother (see Rule 6, clause 2, p. 101, *ante*), it might be inferred that his capacity for legitimation would depend on the law of her domicile.

³ Compare *Story*, ss. 93 *w*, 93 *s*.

⁴ *Re Wright’s Trusts*, 1856, 2 K. & J. 595, 614, judgment of *Page Wood*, V. C.; *Munro v. Munro*, 1840, 7 Cl. & F. 842; *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441.

⁵ *Munro v. Munro*, 1840, 7 Cl. & F. 842.

C is legitimate.

3. *F* is domiciled in Scotland, but has resided for a long time, and is residing, in England at the time both of *C*'s birth and of the marriage. *M* is an Englishwoman domiciled in England. The marriage takes place in London, according to the ceremonies of the Church of England.

C is legitimate.¹

4. *F* and *M* are domiciled in England at the time of *C*'s birth. *C*'s birth takes place in Scotland. *F* and *M* marry in England whilst domiciled there.

C is illegitimate.

5. *F* is domiciled in England, but *M* is domiciled in Scotland at the time of *C*'s birth. The birth and the marriage both take place in England, *F* being domiciled in England and *M* continuing domiciled in Scotland at the time of the marriage.

C is illegitimate.

6. *F* is domiciled in England, but has resided for a long time, and is residing, in Scotland at the time both of *C*'s birth and of the marriage. *M* is an Englishwoman domiciled in England. The marriage takes place in Scotland according to the forms of the Church of Scotland.

C is illegitimate.

7. *F* is domiciled in England, but is residing in Scotland at the time of *C*'s birth. *M* is a Scotchwoman domiciled in Scotland. *C* is born in Scotland. After *C*'s birth, but before the marriage with *M*, *F* acquires a Scotch domicil. *F* marries *M* according to the forms of the Church of Scotland whilst domiciled in Scotland.

C is illegitimate.²

8. *F* is domiciled in Scotland at the time of *C*'s birth, but has long resided in England. *M* is an Englishwoman domiciled in England. *C* is born in England. After *C*'s birth, but before the marriage with *M*, *F* acquires an English domicil. *F* marries *M* whilst domiciled in England.

C is illegitimate.³

Proviso. The proviso, that no one born out of lawful wedlock can inherit English real estate, is a strict application of the prin-

¹ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441; *Munro v. Munro*, 1840, 7 Cl. & F. 842; *Dalhousie v. McDouall*, 1840, 7 Cl. & F. 817. Compare *Shedden v. Patrick*, 1854, 1 Macq. 535, 611.

² This is (substituting Scotland for France) the state of facts decided upon in *Re Wright's Trusts*, 1856, 25 L. J. (Ch.) 621.

³ *Vaucher v. Solicitor to Treasury*, 1888, 40 Ch. D. (C. A.) 216.

ciple that rights to immovables are governed by the *lex situs*, that is, by the ordinary law of the country where the land is situate.¹

The rule of English law is that real property must go to the "heir," and a man must, in order to be an heir, according to English law, fulfil two conditions: First, he must be the eldest living, legitimate son of his father. This condition is fulfilled by a Scotchman who, born of a father domiciled in Scotland, is legitimated by the subsequent marriage of his parents. Secondly, he must be born in lawful wedlock. This condition cannot be fulfilled by a person who is legitimated after his birth. Such a person, therefore, though legitimate, cannot be an English heir, and therefore cannot inherit English land.

On similar grounds he cannot transmit the right to land to his father,² or to collateral relations, since, in order to do this, he must in substance establish the very connection between him and his father which would make him, under different circumstances, heir to his father.

That the want of being born in lawful wedlock, and not illegitimacy on the claimant's part, is the true ground for the decision in *Birtwhistle v. Vardill*,³ is seen from the answer given by the judges to a question submitted to them by the House of Lords. The inquiry made by their Lordships was in substance whether *C*, who was born before the marriage of his parents, who were domiciled in Scotland, could, in virtue of their subsequent marriage and his legitimation according to Scotch law, be heir to real property in England. Part of the answer was as follows:—

"It appears to us that the answer to the question which your Lordships have put must be founded upon this distinction: 'while we assume that [*C*] is the eldest legitimate son of his father, in England as well as in Scotland, we think that we have also to consider whether that status, that character, entitles him to the land in dispute as the heir of his father; and we think that this question, inasmuch as it regards real property situated in England, must be decided according to those rules which govern the descent of real property in that country, without the least regard to those rules which govern the descent of real property in Scotland. We have, therefore, considered whether, by the law of England, a man is the heir to English land merely because he is the eldest legitimate son of his father. We are of opinion that

¹ See chap. xxii., Rule 138, p. 516, *post*.

² *Re Don's Estate*, 1857, 4 Drew. 194, 27 L. J. (Ch.) 98.

³ 1835, 2 Cl. & F. 571.

⁴ *I. e.*, the distinction between "real and personal status" (statutes?).

"these circumstances are not sufficient of themselves, but that we must look further, and ascertain whether he was born within the state of lawful matrimony; because, by the law of England, that circumstance is essential to heirship; and that is a rule, not of a personal nature, but of that class which, if I¹ may use the expression, is sown in the land, springs out of it, and cannot, according to the law of England, be abrogated or destroyed by any foreign rule or law whatsoever. It is this circumstance which in my judgment dictates the answer we must give to your Lordships' question, viz., that, in selecting the heir for English inheritance, we must inquire only who is that heir by the local law."²

Limitations to proviso. — *First.* A person legitimate under Rule 134 in one country is, according to the law of England, legitimate everywhere.³ What the proviso lays down is in effect that a person, in order to be an English "heir," must be something more than legitimate. It does not (as it is often supposed to do) lay down that a man may be legitimate, *e. g.*, in Scotland, but illegitimate in England. Thus, in a case with regard to legacy duty, the question arose what duty was payable by the daughters of a British subject domiciled in France, the daughters having been legitimated by the marriage of their parents after their birth. It was held that they were not strangers in blood to their father, and ought to pay only the £1 per cent. duty due from children, and the law was thus stated: —

"If . . . the daughters of the testator are legitimate by the law of France, and must therefore in this country be considered as having the status of children, it is difficult to see how, in any sense, they can be 'strangers in blood.' Where the Legacy Duty Act uses these words, it is as a description of the status of the person.

"In *Birtwhistle v. Vardill*⁴ it was admitted that the claimant had in England the status of the eldest legitimate son of his father; but inasmuch as he claimed to be heir, and as such entitled to inherit land in England, his status of eldest legitimate son was not enough, and he was held bound to prove that he was 'heir' according to the law of the country in which the land was

¹ The opinion of the judges was delivered by *Alexander, C. B.*

² *Birtwhistle v. Vardill*, 1835, 2 Cl. & F. 571, 576, 577.

³ *Re Don's Estate*, 1857, 27 L. J. (Ch.) 98; 4 Drew. 194. See especially, judgment of *Kindersley, V. C.*, 27 L. J. (Ch.) 100, and *In re Goodman's Trusts*, 1881, 17 Ch. D. (C. A.) 266; *Grey v. Stamford*, [1892] 3 Ch. 88; *In re Andros*, 1883, 24 Ch. D. 637.

⁴ 1840, 7 Cl. & F. 895.

"situated. As he was unable to prove that he was the eldest son of his father born in wedlock, he failed to show that he filled the character of heir, though he did establish his status of eldest legitimate son.

"It is said that the words 'stranger in blood' include the status known to English law as applied to English persons; but this will is that of a domiciled Frenchman, and his status and that of his children must be their status according to the law of France, which, according to *Birtwhistle v. Vardill*, constitutes their English status.

"If, in *Birtwhistle v. Vardill*, the claimant's status was that of eldest legitimate son of his father, it would be absurd to say that he was a stranger in blood.

"The status of these ladies being that of daughters legitimated according to the law of France by a declaration of the father, it is impossible to hold that they are for any purpose strangers in blood, on the mere ground that, if they had been English and their father domiciled in England, they would have been illegitimate."¹

Secondly. The proviso is, it will be observed, strictly confined to "real estate," which descends to the heir. It has clearly no application to movables;² and the principle of the proviso has probably no application to "chattels real,"³ e. g., leases for years, which pass, not to the "heir," but to the personal representative of the deceased.

F, a Scotchman domiciled in Scotland, has, whilst unmarried, a child, *C*, by *M*. *F* afterwards, whilst still domiciled in Scotland, marries *M*, and after *M*'s death dies intestate, possessed of —

- (a) a freehold estate in England;
- (b) money and furniture situate in England;
- (c) a house in London held on a lease of ninety-nine years (personal estate).

C, the child, *does not* inherit the freehold estate, since he is not *F*'s "heir" according to the law of England.⁴

C succeeds to the money, furniture, etc., or the share thereof to which he may be entitled by the law of Scotland.⁵

¹ *Skottowe v. Young*, 1871, L. R. 11 Eq. 474, 477, per *Stuart*, V. C.

² As to succession to movables, see chap. xxx., Rules 180–187, pp. 682–704, *post*.

³ See *Freke v. Lord Carbery*, 1873, L. R. 16 Eq. 461; *In Goods of Gentili*, 1875, Ir. Rep. 9 Eq. 541; *De Fogassieras v. Duport*, 1881, 11 L. R. Ir. 123; *Duncan v. Lawson*, 1889, 41 Ch. D. 394.

⁴ Rule 134, p. 497, *ante*.

⁵ See chap. xxx., Rule 180, p. 682, *post*.

C probably succeeds to the house in London as *F*'s next of kin.¹

Questions suggested by Rule. — The whole Rule, including the proviso, leaves open two questions which cannot be answered with absolute certainty : —

Question 1. — *Can a legitimated person succeed to the English chattels real of an intestate as next of kin under the Statute of Distributions?*

The answer to this question depends on drawing the right inference from the following propositions : —

First. A person born out of lawful wedlock cannot inherit English realty as heir.²

Secondly. Chattels real are not "movables,"³ nor are they "realty;" they are personal estate, and devolve therefore, in case of intestacy, in accordance with the provisions of the Statute of Distributions, and not in accordance with the rules governing the devolution of movables under the law of the intestate's domicile: thus, if an intestate dies domiciled in Scotland, leaving leaseholds in England, the leaseholds devolve in accordance with the English Statute of Distributions.⁴

Thirdly. A person who, though born out of lawful wedlock, is legitimated according to the law of his father's domicile, both at the time of such person's birth and at the time of the subsequent marriage⁵ of his parents, is in England the legitimate child of his father.⁶

Fourthly. Such a legitimated person is his father's legitimate child under the Statute of Distributions, and as such entitled to succeed as next of kin to his father's goods, though his father dies domiciled in England.⁷

¹ This is doubtful. See *Freke v. Carbery*, 1873, L. R. 16 Eq. 461; *In Goods of Gentili*, 1875, Ir. Rep. 9 Eq. 541; *Duncan v. Lawson*, 1889, 41 Ch. D. 394; *De Fogassieras v. Duport*, 1881, 11 L. R. Ir. 123, compared with *In re Goodman's Trusts*, 1881, 17 Ch. D. (C. A.) 266; *In re Grey*, [1892] 3 Ch. 88. And see further discussion of the question. One point may be regarded as clear: the domicile of *F* at his death does not affect one way or another *C*'s right to succeed to *F*'s English leaseholds. (*Duncan v. Lawson*, *supra*.)

² *Birtwhistle v. Vardill*, 1840, 7 Cl. & F. 895; *Re Don's Estate*, 1857, 4 Drew. 194. Compare *In re Grey*, [1892] 3 Ch. 88.

³ *Freke v. Carbery*, 1873, L. R. 16 Eq. 461; *In Goods of Gentili*, 1875, Ir. Rep. 9 Eq. 541.

⁴ *Duncan v. Lawson*, 1889, 41 Ch. D. 394.

⁵ See Rule 134, p. 497, *ante*.

⁶ *In re Goodman's Trusts*, 1881, 17 Ch. D. (C. A.) 266, 294, 295, judgment of Cotton, L. J., pp. 298-300, judgment of James, L. J..

⁷ *Ibid*.

The right inference from these premises is (it is submitted) that a legitimated person is entitled to succeed to the English chattels real of an intestate as next of kin under the Statute of Distributions, and this whether the domicile of the deceased be foreign or English.¹

*Question 2. — What is the effect, according to English law, of a person being made legitimate by the authority of a foreign sovereign?*²

Suppose that a person born illegitimate is legitimated by a decree of the Czar of Russia, will such a person be held legitimate here?

There is no English authority on the subject. The most probable answer is (it is conceived) that the effect of such a decree would, like the effect of a subsequent marriage of the parents, depend on the domicile of such person's father at the time of his birth and at the time when the decree was issued. Suppose, that is to say, that the child's father were domiciled in Russia at the time of the child's birth and at the date of the decree, then the decree would have the effect of making the child legitimate in England. If, on the other hand, the father were domiciled in England, either at the time of the birth or at the date of the decree, the child would apparently not be legitimated in England thereby.

(E) LUNATIC AND CURATOR, OR COMMITTEE.³

RULE 135.⁴ — A foreign decree or commission appointing a person curator or committee of a lunatic resident in a foreign country does not of itself empower the curator or committee to deal with the person or property of the lunatic in England.

¹ In an elaborate note on this question (*Foote*, 2nd ed., pp. 214-222) Mr. Foote arrives, on the whole, at the conclusion here put forward as probable, that a legitimated person can succeed as next of kin to English chattels real.

² See *Bar*, s. 198, p. 442; *Phillimore*, s. 542.

³ See *Westlake*, 3rd ed., pp. 48-51; *Foote*, pp. 55-57; *Phillimore*, ss. 563-564; *In re Houstoun*, 1826, 1 Russ. 312; *Re Elias*, 1851, 3 Mac. & G. 234; *Newton v. Manning*, 1849, 1 Mac. & G. 362; *Scott v. Bentley*, 1855, 1 Kay & J. 281; *Re Garnier*, 1872, L. R. 13 Eq. 532; *Mackie v. Darling*, 1871, L. R. 12 Eq. 319; *In re Stark*, 1850, 2 Mac. & G. 174; *In re Sottomayor*, 1874, L. R. 9 Ch. 677. Compare *In re Barlow's Will*, 1887, 36 Ch. D. (C. A.) 287. In this case, however, the person who, under the New South Wales Lunacy Act, managed the property of lunatic patients as a "Master in Lunacy," did not in strictness represent the lunatic under the law of New South Wales.

⁴ *Ibid.*

Comment and Illustration.

A lunatic was resident in Jamaica, where a commission of lunacy was issued against him. He was brought over by one of his committees to England. A relative in England petitioned for a new commission. It was contended that the Jamaica commission was in force and sufficient. It was held, however, that a new commission was needed.

"The commission now existing in Jamaica," it was laid down, "is no reason why a commission should not issue here. On the contrary, it is evidence of the absolute necessity that there should be somebody authorised to deal with the person and estate of this lunatic. While the lunatic is here, no Court will have any authority over him or his property unless a commission is taken out."¹

Question. — Can a foreign curator sue here for money due to the lunatic?

A person residing in Scotland, there became of unsound mind, and A was appointed his *curator bonis* according to Scotch law. It was held that A could sue in this country for money due to the lunatic, and give a good discharge for it.²

The principle of this decision is thus explained in the judgment:

"In *Newton v. Manning*³ Lord Cottenham is reported to have said that, if a person invest himself abroad with full right to receive the property of a person found lunatic there, when he applies to the jurisdiction of this country he may obtain the lunatic's property. As a party abroad can assign his rights, I do not see why a Court of competent jurisdiction should not transfer them when he becomes a lunatic."⁴

This decision may appear inconsistent with the general principle that a foreign curator has not, as such, authority in this country. His right to sue and his want of authority as curator may, perhaps, be reconciled in the following manner: The status of a foreign curator is not recognised as giving him, from the mere fact of his being curator, control over a lunatic, or his property, in England. But the curator, having by his appointment in a foreign country become, under the foreign law, the owner for certain purposes of the lunatic's property, may enforce his rights

¹ *In re Houstoun*, 1826, 1 Russ. 312, per *Eldon*, Ch.

² See *Scott v. Bentley*, 1855, 1 K. & J. 281; 24 L. J. (Ch.) 244.

³ 1 Mac. & G. 362.

⁴ *Scott v. Beniley*, 1855, 1 K. & J. 281, 284, per *Page Wood*, V. C.

with respect to it in an English Court, just as he might if he had purchased the property, or were an assignee in bankruptcy. The right is one, in fact, acquired by a transaction taking place wholly under the law of a foreign country, and, as such, enforceable here.¹

It must, however, be admitted that the right of the foreign curator to sue for debts due to the lunatic is not thoroughly well established, and, perhaps, not at bottom consistent with the theory that he has no authority in England. But it must always be kept in mind that our Courts have in recent times shown a disposition to deviate from this theory, and to recognise the authority of curators or guardians appointed under the law of a foreign country.

RULE 136.²—If a curator or committee, duly appointed under a foreign decree, applies to the Court to have the person of the lunatic delivered to him, or for the payment to him of money belonging to the lunatic, the Court may in its discretion grant or refuse the application.

Illustrations.

1. A Portuguese is resident in England but domiciled in Portugal. His wife and child reside in Portugal. Proceedings in lunacy have been taken in Portugal by his wife. The Court, on the application of the wife, gives permission for the removal of the lunatic to Portugal, there to be given into the charge of his wife.³

2. An Englishman resident in France was decreed a lunatic there, and A was appointed curator. A fund in this country, to which the lunatic was entitled, was paid into Court under the Trustees' Relief Act. A applied to have the fund paid to him. The Court, in their discretion, retained the capital, and paid only the dividends to A.⁴

¹ See Intro., General Principle No. I., p. 22, *ante*; and *Vanquelin v. Bouard*, 1863, 15 C. B. N. s. 341.

² As to person, see *In re Sottomaior*, 1874, L. R. 9 Ch. 677; as to property, *In re Garnier*, 1872, L. R. 13 Eq. 532; *Re Stark*, 1850, 2 Mac. & G. 174; *Grimwood v. Bartels*, 1877, 46 L. J. Ch. 788, which, though it only decides that a foreign curator cannot claim the English real estate of the lunatic, rather implies that he might claim the movables (situate in England) belonging to the lunatic. See Rule 124, p. 478, *ante*.

³ *In re Sottomaior*, 1874, L. R. 9 Ch. 677.

⁴ *In re Garnier*, 1872, L. R. 13 Eq. 532.

AMERICAN NOTES.

CHAPTER XX.

FAMILY RELATIONS.

1. **GUARDIAN AND WARD.** — “By the law of England and of this country, “a guardian appointed by the Courts of one State has no authority over the “ward’s person or property in another State, except so far as allowed by the “comity of that State, as expressed through its legislature or its Courts ; but “the tendency of modern statutes and decisions is to defer to the law of the “domicil, and to support the authority of the guardian appointed there. *Hoyt v. Sprague*, 103 U. S. 613, 631, and authorities cited ; *Morrill v. Dickey*, 1 Johns. Ch. 153 ; *Woodworth v. Spring*, 4 Allen, 321 ; *Milliken v. Pratt*, 125 Mass. 374, 377, 378 ; *Leonard v. Putnam*, 51 N. H. 247 ; *Commonwealth v. Rhoads*, 37 Pa. St. 60 ; *Sims v. Renwick*, 25 Ga. 58 ; *Dacey on Domicil*, 172-176 ; “*Westlake, Private International Law*, 2nd ed., 48-50 ; *Wharton, Conf. of L.* 2nd ed., ss. 259-268.” *Lamar v. Micou*, 112 U. S. 452, 470 ; *Lamar v. Micou*, 114 U. S. 218. In this case it was held that a guardian should not, in accounting for his investments, be held to a narrower range of securities than was allowed by the law of the ward’s domicil.

2. **LEGITIMACY.** — As to the succession to movables, the status of legitimacy is determined by the law of the domicil of the father at the time of his death. As to the inheritance of real estate, the *lex rei sitæ* governs ; and the status of legitimacy then depends on whether the law of the place applies the test provided for persons domiciled within the territory, or adopts the principle that a child validly legitimated under another law acquires a status which should be recognised everywhere and for all purposes. *Woodward v. Woodward*, 87 Tenn. 644 ; 11 S. W. 892. In the United States, wherever the statute of Merton has been held to be in force, it has been decided that a foreign legitimation, whether by subsequent marriage of the parents, by a legislative act, or by judicial process, is ineffectual for purposes of inheritance. In *Smith v. Derr*, 34 Pa. St. 126 (1859), this rule was applied to a child born in Tennessee and legitimated there by judicial proceedings ; but the statute of Merton has since been repealed in Pennsylvania. In *Lingen v. Lingen*, 45 Ala. 410 (1871), it was held that a child born in France and there formally legitimated could not inherit the realty of his father in Alabama, nor his personalty, if the father was at the time of his death domiciled in that State. In *Barnum v. Barnum*, 42 Md. 252 (1875), it was decided that an Act of the legislature of Arkansas, constituting one person the heir of another, both of them being there domiciled, could not make such person an “heir” in Maryland. The same principle is applied to adoption in *Keegan v. Geraghty*, 101 Ill. 26 (1881). In *Williams v. Kimball* (Fla.), 16 So. 783 (1895), it was expressly held that the statute of Merton was in force, and that consequently the offspring of a slave marriage,

legitimated by an Act of the legislature of Georgia, the place of his birth, and of his domicil at the time of legitimation, could not inherit in Florida.

In *Smith v. Kelly*, 23 Miss. 167 (1851), a child was born in South Carolina of parents who were then domiciled, and who afterward married, in that State ; but such marriage did not by the laws of South Carolina make the child legitimate. Subsequently they all removed to Mississippi, by the laws of which State subsequent marriage of the parents and acknowledgment by the father effect legitimation ; and the child was always recognised by the father as his. But it was held that the condition of the child was "fixed" by the laws of South Carolina, "the place not only of her birth, but of the marriage of her "parents," and that she was illegitimate and could not inherit. It has been said that this decision "is a strong application of the law of the domicil of "origin, and perhaps did not give sufficient effect to the father's recognition "of the child in Mississippi after they had established their domicil in that "State." *Ross v. Ross*, 129 Mass. 243, 260. But the Court clearly intimated that if the child had been legitimated by the subsequent marriage of her parents in South Carolina, she would have been recognised as legitimate in Mississippi. *Smith v. Smith*, 23 Miss. 167, 170. In Louisiana it was held that a statute of Arkansas legitimating a child who, as well as his father, was at the time residing in that State, was a personal statute which accompanied the child and rendered him legitimate everywhere. *Scott v. Key*, 11 La. An. 232 (1856). In 1872 the same principle was applied to the case of a child born in Louisiana of parents who lived there in a state of concubinage, but who subsequently became domiciled and were married in Spain. It was held that, as this marriage legitimated the children in Spain, where the parents were then domiciled, it made them legitimate in Louisiana, though the parents subsequently returned to Louisiana and died there, and though the mother, who was a person of color, could not at the time of the marriage in Spain have married the father, a white man, in Louisiana. In 1880 the Supreme Judicial Court of Massachusetts learnedly discussed the question of legitimacy in a case of adoption, in which it was held that the law of the domicil of the parties at the time of the adoption governed the creation of the status of adoption, and that the status so created should be recognised elsewhere, at least so far as the law of the forum did not forbid. *Ross v. Ross*, 129 Mass. 243, 249-262. In a case in New York, where the statute provides that "children and relatives who are illegitimate shall not be entitled to inherit," a child was born out of wedlock in Würtemberg, of parents then subjects of that country, who afterwards emigrated to America and became domiciled in the State of Pennsylvania, where they were married. While they were still domiciled in that State, the legislature passed a statute, which was made retrospective in its operation, legitimatising children born before the marriage of their parents. Subsequently the family removed to New York, where they lived till the death of the father. It was held that, whether the child was or was not (the Court thought that he was) legitimated, under the law of his domicil of origin, by the marriage of his parents in Pennsylvania, he was by the statute of that State invested with all the rights and privileges of a legitimate child in Pennsylvania ; that the status so created accompanied him wherever he might reside ; and that he could inherit in New York his father's real estate, all of which was acquired subsequently to the passage of the Pennsylvania statute. The Court criticised *Lingen v. Lingen*, *supra*, as "contrary to the general "current of authority." *Miller v. Miller*, 91 N. Y. 315. This decision has been

applied in New York in the following case : *A* was married in 1878 to *B*, from whom he subsequently separated without issue. In 1882 he removed to Connecticut and cohabited with *C*, who in 1884 gave birth to *D*, whom *A* recognised as his child. In the same year (1884) *B* procured a divorce from *A* in New York, the judgment containing the usual prohibition to marry. Soon afterwards *A* and *C* were married in Pennsylvania, where they were temporarily staying, and returned to Connecticut, where they were domiciled, and where they continued to reside till *A*'s death in 1885. *Held*, that the marriage of *A* and *C*, being valid in Pennsylvania, must be recognised as valid in New York ; and that, the statutes of Connecticut providing for the legitimization of a child by the subsequent marriage of his parents, *D* must be recognised as *A*'s sole heir and next of kin. *Stack v. Stack*, 6 Demarest, 280 (1887).

By the Civil Code of California, the father of an illegitimate child may legitimate it by publicly acknowledging it as his own. This statute was held to apply to a child who was born out of wedlock in England of a woman there domiciled, and who, as well as the mother, remained in England till after the death of the father, who was domiciled in California, and who, being temporarily in England when the child was begotten, returned to California before its birth. *Blythe v. Ayers*, 96 Cal. 532 ; 31 Pac. 915.

Children may be legitimated by a constitutional provision. *Hovey v. Clark*, 37 Tex. 686.

3. LUNATIC AND CURATOR, OR COMMITTEE. — See *Vick v. Volz*, 47 La. An. 8 ; 16 So. 568, in which it was held that the tutor of an interdict residing in Switzerland, and regularly appointed under the laws of that country, in which the interdict was domiciled, might exercise his functions through an attorney in fact in Louisiana, in defence of a partition suit brought against such attorney both as agent of the tutor and as curator *ad hoc* of the interdict appointed by the district Court of the parish in which the land lay. See, as to circumscription of curator's authority, *Talbot v. Chamberlain*, 149 Mass. 57 ; 20 N. E. 305. A tutor appointed in Louisiana for minor heirs, whose father was domiciled and died in Kentucky, has no power over personal property of the decedent not situated in Louisiana. *Moise v. Life Association*, 45 La. An. 736.

CHAPTER XXI.

NATURE OF PROPERTY.¹

RULE 137.²—The law of a country where a thing is situate (*lex situs*) determines whether

(1) the thing itself, or

(2) any right, obligation, or document connected with the thing,

is to be considered an immovable or a movable (??).

Comment.

Whether a given thing is in its nature a movable or an immovable, *i. e.*, whether it can in fact be moved or not, is manifestly a matter quite independent of any legal rule. A law, however, may determine that a thing in its nature movable shall, for some or for all legal purposes, be subject to the rules generally applicable to immovables, or that a thing in its nature immovable shall, for some or all legal purposes, be subject to the rules applicable to movables. In this sense, and in this sense alone, law can determine whether a given thing shall be treated as a movable or as an immovable. Thus, the law of England can determine, as in fact it does, that title deeds shall be considered as part of the real estate, and descend to the heir, or in other words that title deeds shall in some respects be considered or treated as immovables. The only law which can effectively determine whether subjects of property shall be treated as movables or immovables is the law of the country where a given piece of property is in fact situate. Law, as already pointed out, deals in reality with rights; and the law of the country where a given tangible thing is in fact located can determine whether the rights over such thing, *e. g.*, land, or obli-

¹ *Story*, s. 447; *Nelson*, pp. 147, 148. Compare, for different views on the subject, *Bar*, *Gillespie's transl.*, 2nd ed., s. 229, p. 505.

² *Chatfield v. Berchtoldt*, 1872, L. R. 7 Ch. 192; *Freke v. Carbery*, 1873, L. R. 16 Eq. 461; *Ex parte Rucker*, 1834, 3 Dea. & Ch. 704; *De Fogassieras v. Dupont* (2), 1881, 11 L. R. Ir. 123; *Duncan v. Lawson*, 1889, 41 Ch. D. 394; *Monteith v. Monteith's Trustees*, 1882, Ct. Sess. Cas., 4th ser., ix. 982.

gations connected with it, or the documents which embody such rights or obligations, shall be treated as movables or immovables. Thus, title deeds, as already pointed out, are in their nature movables, but title deeds in regard to land in England are treated as appurtenant to the land to which they belong. So a rent charge on lands in England *per autre vie* is for some purposes made personal estate by English law without being strictly treated as a movable.¹ And English Courts admit the right of other countries to determine whether property within their limits comes within the class of movables or immovables. When slavery existed in Jamaica, the slaves on the estate were reckoned appurtenant to the land, and have been held by our Courts to pass under a devise of realty in Jamaica.² Heritable bonds,³ again, in so far as they are treated by the law of Scotland as realty or immovables, are recognised as immovables by English Courts.⁴ The last example is specially noticeable in relation to our Rule; it shows that it is the *lex situs* which determines not only the nature of a thing, but also of rights, obligations, or documents connected with a thing. A heritable bond may itself be deposited in a bank in England, but it is Scotch law — the *lex situs* of the land on which the bond imposes a charge — that determines the character of the bond. If this be borne in mind, the language of Story, which, if carelessly read, might be misunderstood, gives a correct view of the case. "In addition," he writes, "to these" [*i. e.*, lands, houses, etc.], "which may be deemed universally to partake of the nature of "immovables, or (as the common-law phrase is) to savour of the "realty, all other things, though movable in their nature, which "by the local law are deemed immovables, are in like manner "governed by the local law. For every nation having authority "to prescribe rules for the disposition and arrangement of all the "property within its own territory, may impress upon it any character which it shall choose; and no other nation can impugn or "vary that character. So that the question, in all these cases, is "not so much what are, or ought to be deemed *ex suâ naturâ*,

¹ *Chatfield v. Berchtoldt*, 1872, L. R. 7 Ch. 192.

² *Ex parte Rucker*, 1834, 3 Dea. & Ch. 704.

³ "A 'heritable bond' is a bond for a sum of money, to which is joined, for "the creditor's further security, a conveyance of land or of heritage, to be held "by the creditor in security of the debt." See "Heritable Bond," *Bell's Dictionary of the Law of Scotland* (ed. of 1882). See, however, the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. cap. 101), s. 117, whereby heritable bonds are now made, for most purposes, part of movable estate.

⁴ *Johnstone v. Baker*, 1817, 4 Madd. 474 (n); *Jerningham v. Herbert*, 1829, 4 Russ. 388, 395; *Allen v. Anderson*, 1846, 5 Hare, 163.

“movables or not, as what are deemed so by the law of the place where they are situated. If they are there deemed part of the land, or annexed (as the common law would say) to the soil or freehold, they must be so treated in every place in which any controversy shall arise respecting their nature and character. In other words, in order to ascertain what is immovable or real property or not, we must resort to the *lex loci rei sitæ*.”¹ And the principle conversely applies to immovables, which, by the *lex situs*, are treated as movables.

¹ *Story*, s. 447.

CHAPTER XXII.

IMMOVABLES.¹

RULE 138.² — All rights over, or in relation to, an immovable (land) are (subject to the exceptions hereinafter mentioned) governed by the law of the country where the immovable is situate (*lex situs*).

Comment.

“The general principle of the common law is, that the laws of the place, where such [immovable] property is situate, exclusively govern, in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them.”³ “The common law has avoided all . . . difficulties by a simple and uniform test. It declares that the law of the *situs* shall exclusively govern in regard to all rights, interests, and titles, in and to immovable property. Of course it cuts down all attempts to introduce all foreign laws, whether they respect persons or things, or give or withhold the capacity to acquire or to dispose of immovable property.”⁴ “All questions concerning the property in immovables, including the forms of conveying them, are decided by the *lex situs*.”⁵ The general principle thus enunciated by Story and by Westlake is beyond dispute, and applies to rights of every description.⁶

¹ Story, chap. x., ss. 424–463 a ; Westlake, chap. viii., pp. 188–201 ; Foote, 2nd ed., chap. vi., pp. 179–213 ; Nelson, pp. 142–148 ; Wharton, ss. 273–296.

As to jurisdiction in respect to immovables, see Book II., Rule 39, p. 214, *ante*, Rule 78, p. 365, *ante*, and Rule 82, p. 384, *ante*.

² *Ibid*.

³ Story, s. 424. Story's statements with regard to the rules of the common law as regards the conflict of laws may be considered to some extent authoritative.

⁴ Story, s. 463.

⁵ Westlake, 3rd ed., p. 189.

⁶ As English Courts have in general no jurisdiction to adjudicate upon questions having reference to foreign land (see Rule 39, p. 214, *ante*), the cases with regard to land which come before them must almost always have reference to land in England. But this is not invariably the case. (See p. 216, *ante*.)

Capacity. — Hence a person's *capacity* to alienate an immovable *inter vivos*,¹ or to make a contract with regard to an immovable, or to devise² an immovable, or to acquire or to succeed³ to an immovable, is governed by the *lex situs*.

"If a person is incapable, from any . . . circumstance, of transferring his immovable property by the law of the *situs*, his transfer will be held invalid, although by the law of his domicile no such personal incapacity exists. On the other hand, if he has capacity to transfer by the law of the *situs*, he may make a valid title, notwithstanding an incapacity may attach to him by the law of his domicile. This is the silent but irresistible result of the principle adopted by the common law, which has no admitted exception."⁴

"It may be laid down as a general principle of the common law, that a party must have a capacity to take according to the law of the *situs*; otherwise he will be excluded from all ownership. Thus, if the laws of a country exclude aliens from holding lands, either by succession, or by purchase, or by devise, such a title becomes wholly inoperative as to them, whatever may be the law of the place of their domicile. On the other hand, if by the local law aliens may take and hold lands, it is wholly immaterial what may be the law of their own domicile, either of origin or of choice."⁵

Formalities of Alienation and of Contract. — So, again, the modes and *formalities of alienation*⁶ of an immovable *inter vivos*, and the restrictions (if any) imposed upon such *alienation*, are governed by the *lex situs*. So also, apparently, are the formalities requisite for any mere *contract* with regard to an immovable. On this last point it is necessary to speak with some hesitation. The language of authors such as Westlake or Story⁷ certainly suggests that every question with regard to an immovable, and therefore the formal validity of a contract having reference to land, is governed by the *lex situs*. No reported case, moreover,

¹ *Story*, ss. 431-463. Compare *Nelson*, p. 147, and see *Sell v. Miller*, 14 Iowa, N. S. 331 (Am.).

² *Ibid.* Compare *In re Hernando*, 1884, 27 Ch. D. 284.

³ *Birtwhistle v. Vardill*, 1840, 7 Cl. & F. 895; *Re Don's Estate*, 1857, 4 Drew. 194; *Fenton v. Livingstone*, 1859, 3 Macq. 497; *Duncan v. Lawson*, 1889, 41 Ch. D. 394.

⁴ *Story*, s. 431.

⁵ *Story*, s. 430.

⁶ *Story*, s. 424; *Adams v. Clutterbuck*, 1883, 10 Q. B. D. 403; *In re Hernando*, 1884, 27 Ch. D. 284.

⁷ See p. 516, *ante*.

it is submitted, contradicts this conclusion, and *Adams v. Clutterbuck*¹ is in its favour.

But the expressions of Westlake and Story will be found, when carefully examined, to apply to forms of *alienation or conveyance*, and do not of necessity apply to the form of a *contract*. The doctrine, moreover, of both these writers, that the formal validity of a contract is determined by the law of the country where a contract is made (*lex loci contractus*), is stated in terms broad enough to cover² a contract in relation to immovables or land, whilst *Adams v. Clutterbuck*³ relates to a conveyance or alienation of land, or at any rate to a contract forming part of a conveyance.

Here we reach the root of the difficulty. Contracts with regard to land usually form part of an instrument which is meant to convey or alienate land or an interest in land, but the form of such an instrument is admittedly determined by the law of the country where the land is situate (*lex situs*). The question, therefore, whether a contract with regard to an immovable is or is not, as to its form, governed by the *lex situs*, can arise only when the contract is not intended to be a conveyance or alienation of the land, as, for example, where *X* agrees in England with *A* that he will, six months after the date of the agreement, hire a house in Paris for *A*, or where *X* agrees with *A* in France that he will, six months after the date of the agreement, let a music hall in London to *A*. In these and similar instances there is an agreement to let land and not a conveyance of it, and the question may arise, whether the form of the contract is governed by the *lex situs* or the *lex loci contractus*. The answer to the inquiry cannot be treated as certain; the better opinion, however, probably is that the formalities of a contract with regard to immovables are governed by the *lex situs*.⁴

Prescription. — The question whether the possessor or occupier of an immovable or land has or has not acquired a title thereto

¹ 10 Q. B. D. 403.

² *Story*, ss. 242-260; *Westlake*, 3rd ed., pp. 249, 251, 252; *Foote*, 2nd ed., p. 352.

³ 10 Q. B. D. 403.

⁴ The question cannot really be raised in England with regard to contracts within the fourth section of the Statute of Frauds, for that enactment, it has been decided, applies to procedure. *Leroux v. Brown*, 1852, 12 C. B. 801; 22 L. J. C. P. 1. Hence a contract with regard to an interest in land cannot be enforced in England unless there is a proper note or memorandum thereof in writing, and this quite independently of the influence of the *lex situs*. See as to procedure, chap. xxxi., Rule 188, p. 711, *post*. See App., Note 13, *Law Governing Contracts with regard to Immovables*.

by lapse of time, i. e., by *prescription*,¹ is to be determined in accordance with the *lex situs*, and this is so whether the land is situate in England or in a foreign country, e. g., France. The reader should, however, bear in mind that it is only indirectly,² and under exceptional circumstances, that an English Court can be called upon to consider whether a person has a title to foreign land.³

Marriage. — The effect of *marriage* on rights over an immovable is governed by the *lex situs*.⁴

*Devolution.*⁵ — Lastly, every question with regard to the devolution of immovables or land in consequence of death is (subject, of course, to the exceptions hereinafter mentioned) governed by the *lex situs*. And this is so whether the devolution takes place under an intestacy or under a will, and whether the immovables be real property or personal property.

The result as regards the devolution of a deceased person's English immovables or land (which may be either real or personal property⁶) is as follows: —

The deceased's real property descends, if he dies intestate, to his heir, and, if he dies having made a valid will, to the devisee.

The deceased's chattels real, e. g., leaseholds, being personal property, pass, whether he dies testate or intestate, to his personal representative, for administration (as contrasted with distribution), in the same manner and on the same principles as the deceased's other personal property, or, in other words, as his movables. But the distribution⁷ of such chattels real must, on

¹ *Beckford v. Wade*, 1805, 17 Ves. 87; *Hicks v. Powell*, 1869, L. R. 4 Ch. 741; *Re Peat's Trusts*, 1869, L. R. 7 Eq. 302; *Pitt v. Dacre*, 1876, 3 Ch. D. 295. Compare *Westlake*, 3rd ed., p. 194, *Foote*, 2nd ed., pp. 183–186, and *Nelson*, p. 147.

² See chap. iv., Rule 39, p. 214, *ante*, and Exception thereto, p. 216, *ante*.

³ See, however, as to the *limitation* to an action, and with regard to an immovable, Exception 3, p. 525, *post*.

⁴ *Story*, ss. 448–454; *Westlake*, 3rd ed., pp. 66, 192; *Harrison v. Harrison*, 1872, L. R. 8 Ch. 342.

As to the Effect of Bankruptcy as an Assignment of Immovables, see chap. x., Rule 66, p. 333, *ante*, and chap. xvii., Rules 106, 107, pp. 442, 443, *ante*, and note that a foreign adjudication of bankruptcy has (in general) no extra-territorial effect as regards immovables.

⁵ *Freke v. Carbery*, 1873, L. R. 16 Eq. 461; *In Goods of Gentili*, 1875, Irish Rep. 9 Eq. 541; *De Fogassieras v. Duport*, 1881, 11 L. R. Ir. 123; *Coppin v. Coppin*, 1725, 2 P. Will. 290; *Balfour v. Scott*, 1793, 6 Bro. P. C. 550; *Drummond v. Drummond*, 1799, 6 Bro. P. C. 601.

⁶ See pp. 72, 73, 311–313, *ante*.

⁷ I. e., in effect the beneficial succession to the leaseholds. See pp. 313–315, *ante*.

the estate being cleared, be made, without any reference to the deceased's *lex domicilii*, if the deceased dies intestate, in accordance with the Statute of Distributions (*lex situs*), and, if the deceased dies having made a valid will, then in accordance with the terms of his will. In other words, the beneficial succession to the deceased's chattels real is governed by the *lex situs* applicable to the particular kind of immovables.¹

The formalities required for the devise of immovables, whether realty or personalty, the restrictions (if any) on such devise or bequest, and generally the validity of a will of lands, are wholly governed by the ordinary testamentary law of England (*lex situs*²).

Difficulties in application of Rule. — The principle that rights over land are governed by the *lex situs* is thoroughly well established. The application, however, of the principle may sometimes give rise to difficulty. It may be hard to determine how far a particular provision of the *lex situs* is in strictness a provision having reference to rights over land.³ It may also not be easy to determine whether, and to what extent, the rights affected by a given transaction are rights over land.⁴

Illustrations.

1. An Englishwoman married to a French citizen is domiciled in France. The marriage takes place in 1894. She is owner of freehold land in England as her separate estate. Her capacity to dispose of the land is governed wholly by the law of England (*lex situs*),⁵ without any reference to the law of France.⁶

2. A French subject domiciled in France is 20 years of age, and owns freehold land in England. He conveys the land to a purchaser. The effect of his minority on the validity of the conveyance is governed wholly by the law of England.⁷

¹ *Duncan v. Lawson*, 1889, 41 Ch. D. 394.

² A question may be raised whether, when a person domiciled in a foreign country, *e. g.*, France, dies intestate leaving English realty which has been converted into personalty (see pp. 312, 313, *ante*), the succession thereto is governed by the *lex domicilii* or the *lex situs*? Semble, it is governed by the *lex situs*.

³ See, *e. g.*, as to the Mortmain Act, 1888, s. 4, *Mayor of Canterbury v. Wyburn*, [1895] A. C. 89; *Attorney-General v. Mill*, 1831, 5 Bli. 593; 2 Dow. & C. 393; *Attorney-General v. Stewart*, 1817, 2 Mer. 143.

⁴ See *In re Piercy*, [1895] 1 Ch. 83.

⁵ *I. e.*, the Married Women's Property Act, 1882 (45 & 46 Vict. cap. 75), s. 1.

⁶ As to capacity, see p. 517, *ante*.

⁷ See *Story*, s. 431.

3. A man of 22 is the citizen of a foreign country where he is domiciled, and under the law of which he is a minor. He owns freehold land in England. His capacity to convey land is unaffected by the fact that he is a minor by the law of his foreign domicile.¹

4. A foreign corporation is formed under the law of New York for the purchase of land, and with a right under the law of New York to hold land. The capacity of the corporation to hold land in England is governed by the law of England.²

5. X, a domiciled Scotchman born out of lawful wedlock, is legitimated, according to Scotch law, by the marriage of his parents after his birth. His father is possessed of freeholds in England and dies intestate. X's capacity to inherit real estate in England is governed by the law of England, and he cannot acquire the freeholds by inheritance.³

6. A man aged 24 is domiciled in a country where he does not attain his majority till he is 25. He contracts for the sale of land in England. The validity of the contract is not affected by his minority under the law of his domicile.

7.⁴ A domiciled Frenchman disposes of freehold land in England. The proper form of conveyance is determined by the law of England.

8. A domiciled Englishman conveys to a purchaser domiciled in England a right of shooting over lands in Scotland. The conveyance is made by an instrument in writing, but not under seal. The law of England does, but the law of Scotland does not, require such a conveyance to be under seal. The conveyance is valid, *i. e.*, the forms required are determined by the law of Scotland.⁵

9. A domiciled Scotchman conveys to a purchaser, who is also a domiciled Scotchman, the right of shooting over land in England. The conveyance is made by an instrument not under seal. The conveyance is invalid, not being in accordance with the law of England (*lex situs*).⁶

¹ *Ibid.* Compare *In re Hernando*, 1884, 27 Ch. D. 284.

² See as to Corporations, *Williams, Real Property*, 17th ed., pp. 277-279.

³ See Rule 134, p. 497, *ante*; *Birtwhistle v. Vardill*, 1840, 7 Cl. & F. 895; *Fenton v. Livingstone*, 1859, 3 Macq. 497. Note that *Birtwhistle v. Vardill* has no reference to taking land otherwise than by descent. *In re Grey's Trusts*, [1892] 3 Ch. 88.

⁴ As to formalities of alienation, see p. 517, *ante*.

⁵ *Adams v. Clutterbuck*, 1883, 10 Q. B. D. 403.

⁶ Inference from *Adams v. Clutterbuck*, 1883, 10 Q. B. D. 403.

10.¹ A domiciled Frenchman is tenant for life of freeholds in England. His right to deal with the freeholds is governed wholly by the law of England.

11. *M* agrees to purchase land in Demerara of *N*, borrows money of *A* in England for the purchase, and agrees in England to secure the money by a mortgage of the land. The land is not properly conveyed to *A* according to the formalities required by the law of Demerara. *M* becomes bankrupt. *X*, *M*'s assignee, completes the purchase of the land from *N*, sells it, and receives the purchase-money. Whether *A* has an equitable right to the purchase-money depends on the law of Demerara (*lex situs*), not of England.²

12.³ A Spanish woman domiciled in Spain marries a Spaniard, domiciled in Spain, on the 1st January, 1890. She owns at the time of her marriage land in England. Her rights over the land are determined (if there is no settlement) by the Married Women's Property Act, 1882 (*lex situs*).⁴

13. An Englishwoman domiciled in England marries a Spaniard domiciled in Spain. At the time of her marriage she is possessed of real estate in England. Prior to the marriage her real estate is, under a settlement which is to take effect according to the law of England, settled to her separate use. Rights over the land are determined, under the settlement, in accordance with English law.⁵

14.⁶ *A* agrees with *X* in England to convey to *X* land in India. *X* refuses to accept the conveyance, on the ground that *A* has not a title to the land. *A* claims a good title by prescription. In proceedings by *A* against *X* to compel *X* to accept a conveyance, the question whether *A* has a good title must be determined in accordance with the law of India (*lex situs*).⁷

15.⁸ A domiciled Scotchman dies possessed of freeholds and leaseholds in England. He leaves no will, or, what in this case is the same thing, no will which is valid according to the law of

¹ See p. 516, *ante*.

² *Waterhouse v. Stansfield*, 1851, 9 Hare, 234; 1852, 10 Hare, 254.

³ As to marriage, see p. 519, *ante*.

⁴ See *Story*, ss. 448-454; *Westlake*, 3rd ed., pp. 66, 192. Compare *In re Hernando*, 1884, 27 Ch. D. 284.

⁵ *In re Hernando*, 1884, 27 Ch. D. 284. But contrast *Martin v. Martin*, 1831, 2 R. & M. 507.

⁶ As to prescription, see p. 518, *ante*.

⁷ Suggested by *Hicks v. Powell*, 1869, L. R. 4 Ch. 741. Compare *In re Peat's Trusts*, 1869, L. R. 7 Eq. 302.

⁸ As to devolution on death, see pp. 519, 520, *ante*.

England. The freeholds descend to his heir,¹ according to the law of England (*lex situs*). The leaseholds devolve upon the deceased's next of kin,² as determined by the Statute of Distributions (*lex situs*).

16.³ *T*, a French subject, dies domiciled and resident in France. He executes a will in accordance with the formalities required by the law of England, *i. e.*, by the Wills Act, 1837,⁴ but not in accordance with the formalities required by the law of France. By his will *T* makes a devise of leaseholds and all other his real estate and chattels real in England to trustees. The devise is valid, *i. e.*, the formal validity of the will as regards immovables is governed by the *lex situs*.⁵

17. *T*, domiciled in a foreign country, devises English leaseholds to trustees upon trust for sale and investment, and directs the investments to be held upon trusts for accumulation extending beyond the periods allowed by the law of England.⁶ The restrictions on the devise of English immovables, and the proceeds thereof, are governed by the *lex situs*, and the devise is invalid.⁷

18.⁸ *T*, domiciled in a foreign country, bequeaths £10,000 to trustees to purchase land in England for the support of a charity. Whether the bequest is void under the Mortmain and Charitable Uses Act, 1888?⁹ Semble, it is.¹⁰ But this is not certain.¹¹

¹ *Birtwhistle v. Vardill*, 1840, 7 Cl. & F. 895.

² *Duncan v. Lawson*, 1889, 41 Ch. D. 394, with which compare *In re Goodman's Trusts*, 1881, 17 Ch. D. (C. A.) 266; and see, as to legitimacy, Rule 134, p. 497, *ante*.

³ As to devise, see pp. 519, 520, *ante*.

⁴ 1 Vict. cap. 26.

⁵ Compare *De Fogassieras v. Duport*, 1881, 11 L. R. Ir. 123. This case is an Irish case and refers to land in Ireland, but undoubtedly is sound in principle and applies to immovables in England. Note that the will, which also contained bequests of movables, was, as regards them, invalid, as not being executed in accordance with the testator's *lex domicilii*. See chap. xxx., Rule 182, p. 686, *post*.

⁶ *I. e.*, by the Thellusson Act, 39 & 40 Geo. III. cap. 98.

⁷ *Freke v. Carbery*, 1878, L. R. 16 Eq. 461, with which compare *In Goods of Gentili*, 1875, Ir. Rep. 9 Eq. 541.

⁸ As to wills of movables, see Rules 181, 182, pp. 684, 686, *post*.

⁹ 51 & 52 Vict. cap. 43, s. 4.

¹⁰ *Attorney-General v. Mill*, 1831, 2 Dow. & Cl. 393; *Curtis v. Hutton*, 1808, 14 Ves. 537; *Westlake*, 3rd ed., p. 191; *Story*, s. 446.

¹¹ See *Mayor of Canterbury v. Wyburn*, [1895] A. C. 89.

The question to be determined is, whether the provisions of the Mortmain Acts constitute a law affecting English land, and designed to prohibit its being left directly or indirectly by will to a charitable use, or, as far as regards

19. *T*, domiciled in England, leaves by will lands in Italy to English trustees upon trust to sell the same, and, having invested the proceeds in English investments, to hold such investments on certain trusts which are valid by the law of England and not valid by the law of Italy. The right of the trustees to take and to sell the land is governed by the law of Italy (*lex situs*). The validity of the trusts as to the proceeds of the land is governed not by the law of Italy, but by the law of England (*lex domicilii*).¹

*Exception 1.*² — The interpretation of a contract with regard to an immovable, and the rights and obligations under it of the parties thereto, are, probably, to be determined in accordance with the proper law of the contract, which need not, though it generally does, coincide with the *lex situs*.

Comment.

The effect of a contract is in general determined by the proper law of the contract, *i. e.*, the law with reference to which the parties presumably intended to contract; and, in the case of a contract in regard to land, this proper law is usually the law of the country, *e. g.*, France, where the land is situate (*lex situs*).³ But it is at least possible that they intended to contract with reference to some other law, *e. g.*, the law of England, and then the law of England and not the *lex situs* ought, it would seem, to determine the effect of the contract.

*Exception 2.*⁴ — Under Exceptions 1 and 2 to Rule 182 [*i. e.*, under the Wills Act, 1861, sections 1 and 2], a will made by a *British subject* may (possibly), as regards such immovables in the United Kingdom as form part of

bequests of personalty, constitute a law limiting the right of bequest, and intended to prohibit death-bed gifts. On the one view, which is apparently that of the House of Lords (*Attorney-General v. Mill*), *T*'s bequest is invalid; on the other view, which is that of the Privy Council (*Mayor of Canterbury v. Wyburn*), *T*'s bequest is valid.

¹ *In re Piercy*, [1895] 1 Ch. 83.

² For meaning of "proper law of the contract," see chap. xxiv., Rule 143, p. 540, *post*. See also, chap. xxv., Rule 151, p. 586, *post*.

³ Compare *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115, 120, 121, 122, judgment of *Willes, J.*

⁴ Whether this Exception exists or not depends on the meaning to be placed upon the term "personal estate" in the Wills Act, 1861 (24 & 25 Vict. cap. 114), ss. 1 and 2, which are reproduced in Exceptions 1 and 2, respectively, to Rule 182. See comment on Exceptions 1 and 2, pp. 690, 694, *post*, and App., Note 15, *The Wills Act, 1861*.

his personal estate,¹ be valid as to form, though not made in accordance with the formalities required by the *lex situs* (??).

*Exception 3.*²—The limitation to an action or other proceeding with regard to an immovable is (probably) governed by the *lex fori*³ (?).

Comment.

Whether the possessor or occupier of land who has no title thereto has acquired by lapse of time a defence against an action or other proceeding for the recovery thereof, under a law (Statute of Limitations) which bars the *remedy* of the person otherwise entitled to recover the land, is a question of procedure, which on general principles ought to be determined, and probably is determined, by English Courts in accordance with the *lex fori*.⁴

It is, however, arguable that the limitation to an action in regard to land is determined by English Courts in accordance with the *lex situs*.⁵ But the authorities in support of this deviation from the well-established principle that procedure is governed by the *lex fori* are, to say the least, not conclusive.⁶ And it is prob-

¹ For the meaning of "personal estate," or "personal property," see Rule 61, p. 311, *ante*.

² See *Beckford v. Wade*, 1805, 17 Ves. 87; *Hicks v. Powell*, 1869, L. R. 4 Ch. 741; *In re Peat's Trusts*, 1869, L. R. 7 Eq. 302; *Pitt v. Dacre*, 1876, 3 Ch. D. 295. Compare, however, *Westlake*, 3rd ed., p. 194, and *Foote*, 2nd ed., pp. 183–186.

³ As to principle that all matters of procedure are governed by the *lex fori*, see chap. xxxi., Rule 188, p. 711, *post*.

⁴ For meaning of *lex fori*, see pp. 66, 75, *ante*.

⁵ *Beckford v. Wade*, 1805, 17 Ves. 87; *Hicks v. Powell*, 1869, L. R. 4 Ch. 741; *In re Peat's Trusts*, 1869, L. R. 7 Eq. 302; *Pitt v. Dacre*, 1876, 3 Ch. D. 295.

⁶ No certain inference can be drawn from cases having reference to land in England, for, when an action is brought in an English Court with reference to English land, the *lex fori* and the *lex situs* coincide, and the case is decided, by whatever name the law be called, in accordance with the law of England.

The cases in which English Courts entertain proceedings with regard to foreign land are necessarily rare and exceptional. (See Rule 39, p. 214, *ante*, and Exception thereto, p. 216, *ante*.) And the reported cases having reference to such proceedings may suggest, but do not show conclusively, that English Courts have held questions of limitation to be governed by the *lex situs*.

Beckford v. Wade, 1805, 17 Ves. 87, is not a case decided by an English Court in reference to foreign land. It is a decision by the Privy Council as a Court of Appeal from Jamaica. It refers to *prescription*, and only shows that the acquisition of a title to land in Jamaica is determined by the law of Jamaica.

Hicks v. Powell, 1869, L. R. 4 Ch. 741, only establishes that, where the *lex situs* deprives a person of title to foreign land, he cannot enforce in England

able that, while the *acquisition of title to land by prescription* is governed by the *lex situs*, the effect of a Statute of Limitations, which only bars the *remedy* for the recovery of land, and does not give a prescriptive title to land, is governed by the *lex fori*.¹

Illustration.

X mortgages land in one of the British colonies to A. X is in England. A brings an action to obtain a foreclosure decree against X.² The time within which such an action can be brought in England is (semble) governed by the *lex fori*.³

any right depending on the possession of a title under the *lex situs*; but the language of *Hatherley*, Ch., p. 746, suggests that, in proceedings with regard to land, questions of procedure may perhaps be governed by the *lex situs*.

In re Peat's Trusts, 1869, L. R. 7 Eq. 302, seems to have been in substance an Indian action. The question to be decided was, what were the shares claimable by different parties interested in a fund in England which represented the proceeds of the sale of land in India. But the decision seems to have rested on the assumption that the right to a share in the fund was the same as the right to a share in the Indian land, and that a person whose right to recover a share in the land was barred by an Indian Statute of Limitations could not in the English proceedings claim the share in the fund which represented such land. It was not, moreover, absolutely necessary to decide what was the effect, in the English proceedings, of the Indian Statute of Limitations.

Pitt v. Dacre, 1876, 3 Ch. D. 295, decides that, in an action to recover from a person in England the arrears of an annuity chargeable on and payable out of the rents of land in Jamaica, the time within which an action may be maintained for the recovery of the annuity is determined, not by the English Statute of Limitations, i. e., the Real Property and Limitation Act, 1833, 3 & 4 Will. IV. cap. 27 (*lex fori*), but by the law of Jamaica (*lex situs*). This is the strongest authority in support of the view that the limitation to an action with regard to land is governed by the *lex situs*, but the case is not, even if rightly decided, quite conclusive. The law of Jamaica, as to the point in question, was the old law of England prior to 3 & 4 Will. IV. cap. 27; and it is possible to explain the case simply on the ground that 3 & 4 Will. IV. cap. 27 applies only to land in England, and that, as regards foreign land, the *lex fori* is the old law of England, which in this case coincided with the *lex situs*.

¹ See especially, *Story*, s. 582, and *Foote*, pp. 183-186.

² See *Paget v. Ede*, 1874, L. R. 18 Eq. 118, and compare *Exception*, p. 216, *ante*, to Rule 39.

³ When, in accordance with Rule 66, p. 333, *ante*, and Rule 106, p. 442, *ante*, an assignment under the bankruptcy law of one country, e. g., England, operates as an assignment to the representative of the bankrupt's creditors of lands situate in another country, e. g., Victoria, the lands, or rather the proceeds thereof, are distributable in accordance with the rules of the English bankruptcy law, and not in accordance with the *lex situs*. This may perhaps be looked upon as a further exception to Rule 138, p. 516, *ante*. The case, however, seems hardly to come naturally under this head; the subject of distribution is not the lands, but the proceeds of the lands.

AMERICAN NOTES.

CHAPTER XXII.

IMMOVABLES.

1. IMMOVABLES GOVERNED BY *lex situs*. — The rule that immovables are governed by the *lex situs* includes all questions of title, the capacity to take or transfer, and the solemnities necessary to a valid conveyance. *Heyer v. Alexander*, 108 Ill. 385; *Moore v. Church*, 70 Iowa, 208; *Succession of Larendon*, 39 La. An. 952; *Sevier v. Douglas*, 44 La. An. 605; *Berthalot v. Fûch*, 44 La. An. 503; 10 So. 867; *Welch v. Adams*, 152 Mass. 74; *First Nat. Bank v. Hughes*, 10 Mo. App. 7; *Ordranax v. Rey*, 2 Sandf. Ch. 36, 49; *Jinwright v. Nelson* (Ala.), 10 So. 91; *Wharton, Conf. of L. s. 372*. Whether a mortgage given in one State, substantially conveying all a debtor's property, operates upon land in another State, depends upon the laws of the latter. *Danner v. Brewer*, 69 Ala. 191. See also, *Harvey v. Edens*, 69 Tex. 420. The question as to what is an immovable is governed by the *lex situs*. *Chapman v. Robertson*, 6 Paige Ch. 627, 630.

In *Kelley v. Davis*, 28 La. An. 773, it is said that the effect of a contract between husband and wife as to realty must be governed by the *lex situs*, their capacity to contract by the *lex domicilii*; but the contract in question was void under either law.

In *Glenn v. Thistle* 23 Miss. 42, where a contract was made in Mississippi for the purchase of land in Louisiana, and the purchase-money was to be paid in Mississippi, the Court said that the law of Louisiana (*lex situs*) would govern as to the title, and the law of Mississippi (*lex loci contractus*) as to the effect of a failure of consideration. In both States, however, the effect of a failure of consideration was the same.

The *lex situs* governs as to prescription. *Wharton, Conf. of L. s. 378*, where the same rule is assumed as to the limitation of actions touching immovables.

2. EFFECT OF MARRIAGE ON RIGHTS TO IMMOVABLES. — The effect of marriage upon the rights of the parties as to immovables is governed by the *lex situs*. *Baum v. Birchall*, 150 Pa. St. 164; 24 Atl. 620; 30 W. N. C. 343; *Richardson v. De Giverville*, 107 Mo. 422; *Nelson v. Goree's Admr.* 34 Ala. 565. But a lien on a husband's estate, created by the law of the matrimonial domicile, to secure the wife's dotal portion, may be enforced on realty in another State. *Kendall v. Coons*, 1 Bush (Ky.), 530. So, obligations created by a woman, valid by the law of her domicile, may be enforced against her property in another State. *Wood v. Wheeler*, 111 N. C. 231; *Read v. Brewer* (Miss.), 16 So. 350; *Clanton v. Barnes*, 50 Ala. 262; *La Selle v. Woolery* (Wash.), 39 Pac. 663.

A marriage contract or settlement is construed as to immovables by the *lex*

situs. *Heine v. Mechanics' & Traders' Ins. Co. (La.)* 13 So. 1; *Castro v. Illies*, 22 Tex. 479; *Fuss v. Fuss*, 24 Wis. 256. See *Besse v. Pellochoux*, 73 Ill. 285.

3. DEVOLUTION OF IMMOVABLES. — The devolution of immovables is governed by the *lex situs*. *Grimball v. Patton*, 70 Ala. 626; *Baubichon's Estate*, Myrick's Probate (Cal.), 55; *Pratt v. Douglas*, 38 N. J. Eq. 516. Money into which immovables have been improperly converted is distributed in accordance with the law of the *situs* of such immovables. *Lewis v. Barry*, 72 Pa. St. 18. See *Butler v. Green*, 16 N. Y. Supp. 888.

As to the effect of legitimation by marriage on the capacity to inherit immovables, see "Legitimacy," American Notes under chap. xx.

A child lawfully adopted in a State other than that in which certain lands lay was held capable of inheriting. *Van Matre v. Sankey*, 148 Ill. 536; 36 N. E. 628.

The rights of a posthumous child as to the inheritance of immovables are governed by the *lex situs*. *Eyre v. Storer*, 37 N. H. 114.

4. DEVISE OF IMMOVABLES. — A will, in order to pass title to land, must be executed in accordance with the formalities prescribed by the *lex situs*. *Robertson v. Pickrell*, 109 U. S. 608; *Croll v. Clark*, 20 Fla. 849; *Martin's Estate*, 11 Pa. Co. Ct. 245. *Contra*, *Lyon v. Ogden*, 85 Me. 374; 27 Atl. 258, where, under the statutes of Maine, an attestation in conformity with the laws of the place in which the will was executed, but not in conformity with the laws of Maine, where the land lay, was held to be valid.

Generally speaking, all questions touching the validity, construction, and effect of wills relating to immovables are determined by the *lex situs*, *Proctor v. Clark*, 154 Mass. 45; 27 N. E. 673; *Washburn v. Van Steenwyk*, 32 Minn. 336; *Lockwood v. Lockwood*, 51 Hun, 337; *Vogel v. Lehrter*, 18 N. Y. Supp. 923; *Moody v. Johnson*, 112 N. C. 798; *Penfield v. Town*, 1 N. Dak. 216; 46 N. W. 413; *Holman v. Hopkins*, 27 Tex. 38; *Ware v. Wisner*, 50 Fed. Rep. 310; *e. g.*, the validity of a charitable devise as against the heir at law; *Jones v. Habersham*, 107 U. S. 174; the validity of a direction for the accumulation of the income of realty, *Hobson v. Hale*, 95 N. Y. 588 (see *Despard v. Churchill*, 53 N. Y. 192); the effect of a devise on the widow's right to dower, *Atkinson v. Staigg*, 13 R. I. 725. The Courts of one State will not be bound, in respect of lands there situate, by the construction put upon a will by the Courts of another State. *McCartney v. Osburn*, 118 Ill. 403; *Keüh v. Keüh*, 97 Mo. 223; 10 S. W. 597. But the Court of the *situs* may, in determining the meaning intended to be conveyed by certain words, infer such meaning from the sense attached to them by the law of the State in which the will was made. *Guerard v. Guerard*, 73 Ga. 506. See, also, *Ford v. Ford*, 70 Wis. 19; 1 *Jarman on Wills*, 6th ed., Bigelow, pp. 1, 2.

The foreign probate of a will does not affect the title to lands. *McCormick v. Sullivan*, 10 Wheaton, 192, 202; *Wells, Fargo & Co. v. Walsh* (Wis.), 57 N. W. 969. See, however, *Otto v. Doty*, 61 Iowa, 23; *Bleidorn v. Pilot, &c. Co.* (Tenn.) 15 S. W. 737.

The testamentary execution of a power of appointment given by a will in relation to land is governed by the *lex situs*. *Sewall v. Wilmer*, 132 Mass. 131. See also, *Cotting v. De Sartiges*, 17 R. I. 668.

CHAPTER XXIII.

MOVABLES.¹

Capacity.

RULE 139.²—A person's capacity to assign a movable, or any interest therein, is governed by the law of his domicile (*lex domicilii*) at the time of the assignment (?).

This Rule must be read subject to the effect of Rules 140 and 141.³

Comment.

In principle, capacity for the assignment of a movable, *e. g.*, by gift or sale, should be governed by the *lex domicilii* of the assignor.⁴ Thus if X, a minor domiciled in Scotland, makes a gift of goods in England, his capacity to make and, therefore, the valid-

¹ *Westlake*, 3rd ed., chap. vii., and especially, pp. 179-185; *Foote*, pp. 236-251; *Phillimore*, ss. 581-592; *Story*, ss. 374-402; *Wharton*, ss. 297-377; *Savigny* (*Guthrie's transl.*, 2nd ed.), ss. 366-368, pp. 174-187; *Bar* (*Gillespie's transl.*, 2nd ed.), ss. 222-228, pp. 488-502.

The Rules in this chapter refer to individual assignment of movables, *e. g.*, by sale or gift. See for General Assignment of Movables in consequence of—

(1) Marriage. (See pp. 648-655, *post*.)

(2) Bankruptcy. (See pp. 333-344, 442-447, *ante*.)

(3) Death. (See pp. 345-355, 456-466, *ante*, and compare chaps. xxix., xxx., *post*.)

² See *Savigny*, *Guthrie's transl.*, s. 367, p. 182. Contrast *Wharton*, ss. 329-333. Compare *North Western Bank v. Poynter*, [1895] A. C. 56, especially language of Lord Watson, p. 75.

³ See pp. 530, 533, *post*.

⁴ See, *e. g.*, *Savigny*, s. 367, p. 182. Though *Savigny* is of course not an authority in England even in the sense in which *Story* may, within certain limits, be taken as an authority for the guidance of English judges, yet the doctrines supported by the English Courts of recent years, in reference to the choice of law, have tended, especially as regards the law governing the assignment of movables, to coincide with the principles laid down by *Savigny*. His views, therefore, are well worth referring to on questions as to which no definite decision has been given by English Courts.

ity of the gift depends (it would seem) upon the law of Scotland. But on this matter it is impossible to speak with certainty. Capacity to alienate movables probably stands in the same position as capacity to contract, and there is¹ considerable doubt as to the limits within which contractual capacity is governed by the *lex domicilii*. We may, at any rate (it is submitted), assume that, where in fact a good title to a movable is acquired under the *lex situs*, it will be treated as valid in England, even though the person, *e. g.*, a minor, conferring the title under the *lex situs* was incapable of giving a good title under his *lex domicilii*, or, in other words, that Rule 139 is, in case of conflict, liable to be overridden by either Rule 140 or Rule 141.

Assignment of Movables in Accordance with Lex Situs.

RULE 140.²—An assignment of a movable which can be touched³ (goods), giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (*lex situs*), is valid.⁴

Comment.

“As to personal chattels,⁵ it is settled that the validity of a “transfer depends, not upon the law of the domicile⁶ of the owner,

¹ See chap. xxiv., Rule 146, p. 543, and Exception 1, p. 546, *post*.

² *Cammell v. Sewell*, 1860, 5 H. & N. 728; 1858, 3 H. & N. 617; *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414, 429, opinion of *Blackburn, J.*, delivered to H. L.; *Freeman v. E. India Co.* 1822, 5 B. & Ald. 617; *Liverpool Marine Co. v. Hunter*, 1867, L. R. 4 Eq. 62; *In re Queensland &c. Co.* [1891] 1 Ch. 536, 545, judgment of *North, J.* Though this case is decided by the C. A. [1892] 1 Ch. 219, on a ground different from that taken by *North, J.*, no dissent is expressed from his view as to the authority of the *lex situs*. *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

³ Movables (as already pointed out, pp. 65, 71, 72, *ante*) are either things which can be moved and touched, *i. e.*, goods, or things which cannot be touched, *i. e.*, choses in action or debts. As to the assignment of the latter, see Rule 141, p. 533, *post*.

⁴ *I. e.*, of course, in England.

⁵ See, for whole of this quotation, *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238, 267, 268, judgment of *Kay, L. J.*

⁶ This language probably only refers to cases in which a title acquired under the owner's *lex domicilii* comes into competition with a title acquired under the *lex situs* of the movable. We should go further than the authorities justify if we laid down that under no circumstances could a title acquired merely under the *lex domicilii* be good (see Rule 142, p. 535, *post*).

"but upon the law of the country in which the transfer takes place. Our own law as to distress and market overt is illustrative of this. The goods of a foreigner distrained in the house tenanted by an Englishman in this country may be sold for the tenant's rent, and the purchaser acquires a perfect title, whatever may be the law of the owner's domicil. So the goods of a foreigner sold here in market overt by one who had no title to them could not be recovered from the purchaser. In both cases the property would pass to him by our law.

. . . "The cases on the subject are clear and consistent. In *Cammell v. Sewell*¹ the master of a Prussian vessel sold the goods of an Englishman, which were on board his ship in Norway, under circumstances which gave the purchaser no title according to English law, but a good title according to the law of Norway, and it was held in the Exchequer Chamber that the law of Norway must govern the transaction, and that the property had passed to the purchaser. The authority of that decision was recognised in *Hooper v. Gumm*,² and by the House of Lords in *Castrique v. Imrie*³ and *Williams v. Colonial Bank*."⁴

"In my view," says North, J., in another case, . . . "it is not necessary for me to express any opinion on this interesting and difficult question [viz., as to the effect of the *lex domicilii*]; for, assuming the principle above stated [viz., *mobilia sequuntur personam*] to include such a case as the present, there is another equally well-known rule of law, viz., that a transfer of movable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by showing that such transfer as carried out is not in accordance with what would be required by law in the country where its owner is domiciled. To give an instance. According to Scotch law it is necessary, in order to give a charge on corporeal movables, that they should be delivered to and placed in the possession of the creditor. But if a domiciled Scotchman resident in London gave a duly registered bill of sale on the furniture of his house, that would be a complete and effectual transfer of the property, without its being delivered to the creditor, notwithstanding that such a disposition of furniture in Scotland would have been ineffectual without delivery."⁵

¹ 3 H. & N. 617; 5 H. & N. 728; 29 L. J. Ex. 350.

² L. R. 2 Ch. 282.

³ L. R. 4 H. L. 414.

⁴ 15 App. Cas. 267.

⁵ *In re Queensland &c. Co.* [1891] 1 Ch. 536, 545, judgment of North, J.

These judicial dicta are, it is submitted, decisive in support of Rule 140. They show that the notion once prevalent, and in favour of which strong dicta may be cited,¹ that the transfer or assignment of an individual movable was invalid unless made in accordance with the owner's *lex domicilii*, is now rejected by our Courts, and that the transfer of goods in accordance with the *lex situs* gives a good title in England whatever be the domicil of the owner, or whatever the mode of transfer.

A judgment *in rem* by a Court of competent jurisdiction which transfers the property in goods from one person to another is *à fortiori* conclusive, and gives a good title to the person in favour of whom the judgment is given,² and the effect in this respect of such a judgment may now be considered a deduction from the principle stated in Rule 140. This should be noted, because most if not all of the decisions, as contrasted with the judicial dicta, which can be cited in support of our Rule, refer to judgments, or to proceedings of a judicial character.³

Illustrations.

1. *A* is a domiciled Frenchman. His watch is stolen in London and sold to *X* in market overt. *X* acquires a good title against *A*, even if *A* shows that a sale in market overt does not give a good title according to the law of France.⁴

2. *A* is domiciled in Germany, but is resident in lodgings in London. His goods are seized by the superior landlord, under a distress for rent due from the lodging-house keeper. The goods are sold to *X*. *X*, whatever the law of Germany, has a good title to the goods as against *A*.⁵

3. *A* is domiciled in England. His ship is wrecked on the coast of Norway. The cargo is sold, wrongfully according to English law, by *M*, the captain, to *X*, who acquires a good title according to Norwegian law. *X* brings the goods to England. *X* has a good title here to the goods against *A*.⁶

¹ *E. g.*, judgment of *Loughborough*, Ch., in *Sill v. Worswick*, 1791, 1 H. Bl. 665, 690.

² See chap. xvi., Rule 102, p. 427, *ante*.

³ *E. g.*, *Cammell v. Sewell*, 1860, 5 H. & N. 728; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238; *In re Queensland &c. Co.* [1891] 1 Ch. 536; [1892] 1 Ch. (C. A.) 219.

⁴ See, for these cases, *Cammell v. Sewell*, 1860, 5 H. & N. 728, 743, 744, *per Curiam*. Compare language of *Kay, J.*, in *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238, 268, cited, pp. 530, 531, *ante*.

⁵ *Ibid.*

⁶ *Ibid.*

RULE 141.¹ — An assignment of a movable which cannot be touched, *i. e.*, of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt), is valid.

Provided that

- (1) the liabilities of the debtor are to be determined by the law governing the contract between him and the creditor ;²
- (2) the right to recover the debt is, as regards all matters of procedure, governed by the *lex fori*.³

Comment.

There has been, and still exists, some uncertainty as to the law which, in case of conflict, governs the assignment of a debt. It has sometimes been held to be the *lex fori*.⁴ According to another view, the law governing the assignment is the law of the domicile of (apparently) the creditor.⁵ The doctrine which is now pretty well established in England is that which is enunciated in our Rule, *viz.*, that an assignment of a debt is valid if made in accordance with the *lex situs*, in so far as a *situs* or locality can be by a sort of analogy attributed to a debt.

For a debt, though it has not in strictness any local situation, may be so connected in different ways with a particular country as to possess something which bears an analogy or resemblance to a *situs*. Thus, the place where a debtor resides (or perhaps where a debt is made payable) may be, and for many purposes is, held the *situs* of the debt; and so, again, where a debt arises from a bill of exchange or other negotiable instrument, the bill or instrument has itself a local situation which may be, and is in fact, treated for many purposes as the *situs* of the debt.⁶ When, therefore, a *situs* or local situation can be thus artificially ascribed to a debt, the assignment thereof in accordance with the

¹ See especially, *Foote*, 2nd ed., pp. 247-251 ; *Westlake*, 3rd ed., pp. 183-185 ; *Story*, ss. 395-400 *b* and 565. *In re Queensland &c. Co.* [1891] 1 Ch. 536 ; [1892] 1 Ch. (C. A.) 219 ; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

² *Lee v. Abdy*, 1886, 17 Q. B. D. 309 ; *Colonial Bank v. Cady*, 1890, 15 App. Cas. 267.

³ See chap. xxxi., Rule 188, p. 711, *post*.

⁴ *The Milford*, 1858, Sw. 362.

⁵ See especially, *Story*, s. 397.

⁶ Compare pp. 318-321, *ante*.

lex situs is, speaking generally, a valid assignment.¹ Hence the sale of a bill in accordance with the law of the country where the bill is situate is a valid assignment or transfer of the bill and the rights arising under it.²

Provisos. — We must, however, in this matter, distinguish between the *validity* of the assignment or transfer of the debt and the *effect* of the assignment as against the original debtor.

The *validity* of the assignment depends on the *lex situs*, *i. e.*, on the law of the place where the debt is to be considered as situate.

The *effect*, on the other hand, of the assignment, as against the debtor, *i. e.*, what are the rights acquired by the assignee, must (it is submitted) depend on the law which governs the contract between the debtor and the creditor (assignor). Under whatever law the assignment takes place, the liability of the debtor, *X*, cannot be increased through the assignment by the creditor to another person of the claim against the debtor.³

The rights, further, of set-off and the like, which under English law are treated as matters of procedure,⁴ are governed wholly by the *lex fori*.

Illustrations.

1. An English bill payable in England is drawn and accepted in England by an English firm domiciled in England. It is indorsed in Norway for value to *B*. In consequence of judicial proceedings in Norway against *L* (*B*'s partner), the bill is seized in accordance with Norwegian law, and, on judgment being given against *L*, is, when overdue, sold in accordance with Norwegian law to *A*. Under the law of Norway, *A*, though the bill is overdue, takes a perfect title to the bill and the proceeds thereof freed from all equities or claims of *B*. Under the law of England, a purchaser of the bill in England would, the bill being overdue, have taken it subject to the claims of *B*. The validity of the

¹ The two recent cases, *In re Queensland &c. Co.* [1891] 1 Ch. 536; [1892] 1 Ch. (C. A.) 219, and *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238, which most distinctly affirm the validity of an assignment of a moveable in accordance with the *lex situs*, both refer to the assignment of a chose in action, or debt.

Compare *Colonial Bank v. Cady*, 1890, 15 App. Cas. 267, and same case, *nom. Williams v. Colonial Bank*, 1888, 38 Ch. D. (C. A.) 388.

² *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

³ See *Foote*, 247-251.

⁴ See chap. xxxi., Rule 188, p. 711, *post*.

assignment is governed by the law of Norway, and *A*'s claim to the bill and the proceeds thereof is valid as against *B*.¹

2. *X & Co.*, an English banking company, assign to *B* debts owing to *X & Co.* from debtors resident in Scotland. No notice of the assignment is given to the Scotch debtors. *A* brings an action in Scotland against *X & Co.* and arrests (attaches) the debts due from the Scotch debtors to *X & Co.* Under Scotch law, the arrestment is equivalent to an assignment to *A* with intimation or notice to the debtors. Under the law of England, the assignment to *B* would under the like circumstances take priority over the assignment to *A*. *A* obtains judgment in Scotland against *X* for more than the amount of the debts arrested. He has obtained a good title under the assignment in accordance with the *lex situs* (Scotland). The assignment is valid, and the claim of *A* has priority to the claim of *B*.²

3. *X*, an Englishman, incurs in England a debt to *A*, also an Englishman. The debt is assigned in France by *A* to *B*. The validity and extent of *B*'s claim against *X* is governed by the law of England, *i. e.*, it depends upon the obligations incurred under English law by *X* to *A*.³

4. The circumstances of the case are the same as in Illustration 3. *B* brings an action against *X* for the debt. *X*, at the time of contracting the debt, has a set-off against *A*. *X* can plead the set-off in the action by *B*.

RULE 142.⁴ — Subject to the exception hereinafter mentioned, and to Rules 140 and 141,⁵ the assignment of a movable, wherever situate, in accordance with the law of the owner's domicile, is valid.

¹ *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238. See especially, pp. 253-255, judgment of *Romer, J.*; pp. 263, 264, judgment of *Lindley, L. J.*; pp. 267, 268, judgment of *Kay, L. J.*

² Compare *In re Queensland &c. Co.* [1891] 1 Ch. 536; [1892] 1 Ch. (C. A.) 219. This case is decided by *North, J.*, on the ground given in the illustration. It is decided by the Court of Appeal (affirming the judgment of *North, J.*) on a different ground, but the Court does not seem to question the soundness of the view taken by *North, J.* Note that *In re Queensland &c. Co.* is an instance of a distinct conflict between the *lex situs* and the *lex domicilii*, and that the *lex situs* prevailed.

³ Compare *Lee v. Abdy*, 1886, 17 Q. B. D. 309.

⁴ See *Story*, s. 384.

⁵ See p. 530, and p. 533, *ante*.

Comment.

"The general rule is, that a transfer of personal property, good by the law of the owner's domicile, is valid wherever else the property may be situate."¹ "The transfer of personal property must be regulated by the law of the owner's domicile, and, if valid by that law, ought to be so regarded by the Courts of every other country where it is brought into question."²

No reported case can (it is believed) be cited as absolutely supporting this Rule³ in reference to individual assignments, *e. g.*, by gift or sale; but the validity of such assignments, when made in accordance with the owner's *lex domicilii*, is so uniformly taken for granted by judges and by writers of eminence, such as Story, that we may assume that a sale or gift by a person domiciled in England will, at any rate if made in England, be held (if it be in accordance with English law) to be valid as regards goods wherever situate. Whether the same principle will apply to all other cases admits of doubt.

X, for example, domiciled and being in England, makes a gift by deed to *A* of goods at Paris. The gift is valid here without reference to French law.⁴ If *X* were to bring the goods to England, no third person⁵ having acquired a title to them under French law, the goods would be held to be the property of *A*.

The same result ought (it would seem) to follow if *X*, when domiciled in England, but being in France, makes a gift by deed to *A* of goods at Paris. In such a case, however, our Courts would possibly hold that the form required by the *lex loci* was imperative, and that therefore, if the gift does not, by the law of France, pass the property in the goods, there has been no transfer of property at all.

X, again, domiciled and being in a foreign country, where property in goods can be conveyed by a verbal gift, gives *A*, by word of mouth, furniture of *X*'s in London. The property (perhaps) passes to *A*.

¹ Story, s. 384. Compare *North Western Bank v. Poynter*, [1895] A. C. 56.

² *Liverpool Marine &c. Co. v. Hunter*, 1868, L. R. 3 Ch. 479, 483, judgment of Chelmsford, Ch.

³ The cases which may be cited refer to general assignments, *e. g.*, in case of death.

⁴ As to French law, see *Code Civil*, Art. 931.

⁵ This limitation must probably be added in accordance with Rule 140, p. 530, *ante*. See *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414; *Cammell v. Sewell*, 1860, 5 H. & N. 728; *Stringer v. English &c. Ins. Co.* 1870, L. R. 5 Q. B. 599.

It must, however, remain doubtful whether at any rate the two last cases do not fall within the Exception to our Rule.

If a title acquired under the owner's *lex domicilii* conflicts with a title acquired under the *lex situs*, the latter (it is submitted) prevails. *X*, domiciled in England, there by deed gives goods in France to *B*. He afterwards in France gives them by delivery to *A*. If *A* obtains a good title under the law of France, the gift to *A* is valid in England as against the claim of *B*.¹

Exception. — When the law of the country where a movable is situate (*lex situs*) prescribes a special form of transfer, an assignment according to the law of the owner's domicile (*lex domicilii*) is, if the special form is not followed, invalid.²

Comment.

The law of the owner's domicile does not determine the validity of a transfer of movables, if "there is some positive or customary law of the country where they are situate providing for special cases (as is sometimes done), or, from the nature of the particular property, it has a necessarily implied locality."³ Among the latter class have been placed contracts respecting public funds or stock, the local nature of which requires them to be carried into execution according to the local law. No positive transfer can be made of such property except in the manner prescribed by the local regulations.⁴

¹ But see *Coote v. Jecks*, 1872, L. R. 13 Eq. 597. The question as to a conflict, in the case of a gift of goods, between the *lex situs* and the *lex domicilii*, might (seem) have been raised, but was not raised, in *Cochrane v. Moore*, 1890, 25 Q. B. D. (C. A.) 57.

² *Story*, s. 383. See *Robinson v. Bland*, 1760, 2 Burr. 1077, 1079; 1 W. Bl. 234, 246.

³ *Story*, s. 383.

⁴ *Ibid.*

AMERICAN NOTES.

CHAPTER XXIII.

MOVABLES.

(Rules 139-141.) **INDIVIDUAL ASSIGNMENT OF MOVABLES.** — A transfer of movables, made in the country of the owner's domicile and in accordance with the law there prevailing, will generally be enforced by the Courts of the country where the property is situated, although the mode of transfer may be different from that prescribed by the law of the latter country. *Green v. Van Buskirk*, 5 Wall. 307; 7 Wall. 139; *Barnett v. Kinney*, 147 U. S. 476; 13 Sup. Ct. 403; *Warner v. Jaffray*, 96 N. Y. 248; *Frank v. Bobbitt*, 155 Mass. 112; 29 N. E. 209. This rule, however, must give way when the statutes of the country where the property is situated, or the established policy of its laws, prescribe a different rule. *Green v. Van Buskirk*, 5 Wall. 307; 7 Wall. 139; *Barnett v. Kinney*, 147 U. S. 476; 13 Sup. Ct. 403; *Barth v. Backus*, 140 N. Y. 230; 29 N. E. 209; *Frank v. Bobbitt*, 155 Mass. 112. As to conflict of laws touching conditional sales, see *Benjamin on Sales*, 6th Am. ed., Bennett, p. 292.

The general rule stated above as to the transfer of movables applies to the voluntary assignment by a debtor of his movables for the benefit of his creditors. *Barnett v. Kinney*, 147 U. S. 476; 13 Sup. Ct. 403; *Schroeder v. Tompkins*, 58 Fed. Rep. 672; *Frank v. Bobbitt*, 155 Mass. 112; 29 N. E. 209; *Woodward v. Brooks*, 128 Ill. 222; 20 N. E. 658; *Lipman v. Link*, 20 Ill. App. 359; *Green v. Wallis Iron Works*, 49 N. J. Eq. 48; 23 Atl. 498; *Matthews v. Lloyd*, 89 Ky. 625; 13 S. W. 106; *Butler v. Wendell*, 57 Mich. 62; *Lane v. Wheelwright*, 143 N. Y. 634; *Vanderpoel v. Gorman*, 140 N. Y. 563; *Egbert v. Baker*, 58 Conn. 319; 20 Atl. 466; *Covey v. Cutler* (Minn.), 56 N. W. 255; *Paige v. Sezsmith Lumber Co.* 31 Minn. 136; *Smith's Appeal*, 104 Pa. St. 381; *Zuppan v. Bauer*, 17 Mo. App. 678; *Weider v. Maddox*, 66 Tex. 372. Such assignment may be enforced against subsequently attaching creditors of the place where the property is situated. *First Nat. Bank v. Walker*, 61 Conn. 154; 23 Atl. 696; *Train v. Kendall*, 137 Mass. 366; *Princeton Mfg. Co. v. White*, 68 Ga. 96; *Van Wyck v. Read*, 43 Fed. Rep. 716; *Askew v. La Cygne Exchange Bank*, 83 Mo. 366; 53 Am. Rep. 590; *Smith's Appeal*, 104 Pa. St. 381; *Cook v. Van Horn*, 81 Wis. 291; 50 N. W. 893; *Thompson v. Fry*, 51 Hun. 296; 4 N. Y. Supp. 166. See *Bacon v. Horne*, 123 Pa. St. 452. This rule is, however, subject to the *lex situs*, under which the Courts may refuse to enforce the assignment as against domestic creditors, or on other grounds of interest or policy. *Green v. Van Buskirk*, 5 Wall. 307; 7 Wall. 139, approved in *Barnett v. Kinney*, 147 U. S. 476; 13 Sup. Ct. 403; *Townsend v. Coxe* (Ill.), 37 N. E. 689; *May v. First Nat. Bank of Attleboro*, 122 Ill. 551; *Henderson v. Schaas*, 35 Ill. App. 155; *Green v. Wallis Iron Works*, 49 N. J. Eq. 48; 23 Atl. 498; *Kansas City Packing Co. v. Hoover*,

1 App. D. C. 268 ; *Faulkner v. Hyman*, 142 Mass. 53 ; *Warner v. Jaffray*, 96 N. Y. 248 ; 48 Am. Rep. 616 ; *Grady v. Bowe*, 11 Daly, 259 ; *J. M. Atherton Co. v. Ives*, 20 Fed. Rep. 894 ; *In re Dalpay*, 41 Minn. 532 ; 43 N. W. 504 ; *Weiskettle's Appeal*, 103 Pa. St. 522. See *Frank v. Bobbitt*, 155 Mass. 112 ; 29 N. E. 209. Statutes in general terms forbidding an assignment with preferences are to be construed as affecting only domestic assignments. *Barnett v. Kinney*, 147 U. S. 476 ; 13 Sup. Ct. 403 ; *Buller v. Wendell*, 57 Mich. 62 ; *Juillard v. May*, 130 Ill. 87 ; 22 N. E. 477 ; *Matthews v. Lloyd*, 89 Ky. 625. *Contra, Ex parte Dickinson*, 29 S. C. 453, where an assignment made in New York, preferring the claims of employees, as required by the laws of New York, was held to be invalid on the ground of such preference in South Carolina, as against the subsequent attachments of foreign creditors. See *Russell v. Tunno*, 11 Rich. 303 ; *Bank v. Stelling*, 31 S. C. 360 ; 9 S. E. 1028.

Where partners, resident or domiciled in New Jersey, but doing business in New York, made an assignment of property in the latter State with preferences, such assignment was held to be valid in New York, though by the laws of New Jersey assignments with preferences are invalid. *Smedley v. Smith*, 8 N. Y. Supp. 100.

A statute forbidding corporations to assign with preferences, in contemplation of insolvency, does not apply to a foreign corporation. *Lane v. Wheelwright*, 69 Hun, 180 ; affirmed, 143 N. Y. 634. See *Boehme v. Rall* (N. J.), 26 Atl. 832. On the other hand, a foreign corporation not prohibited by its charter may assign with preferences, or confess judgment by way of preference, in a State where it is lawful to do so, and such assignment or confession will be valid as to property there situate, though a general enactment of the State under whose laws the corporation was created makes such acts unlawful. *Pairpoint Mfg. Co. v. Watch Co.* 161 Pa. St. 17 ; 23 Atl. 1003 ; 34 W. N. C. 216 ; *Hall v. Ohio &c. Co.* 24 Wkly. Law Bul. 310.

It has been held in New York that the title of a citizen of that State to personal property is not divested by its sale in a foreign country, without his authority or consent, to another citizen of the State, though the sale was sufficient to pass title in the foreign country. *Edgerly v. Bush*, 81 N. Y. 199. See also, *Wylie v. Speyer*, 62 How. (N. Y.) Pr. 107, where this principle was applied to overdue coupons sold in a foreign country and sent to New York, where they were payable, for collection.

The validity of a gift *causa mortis* is determined by the law of the place where it is made. *Emery v. Clough*, 63 N. H. 552.

An assignment, by a creditor residing in one State, of a debt due from a person residing in another State, is, if valid according to the laws of the former State, good in the State in which the debtor resides against the attachments of citizens of other States. *Consolidated Tank Line Co. v. Collier*, 148 Ill. 259 ; 35 N. E. 756.

Where the *lex situs* of a movable prescribes a special form of transfer, an assignment according to the *lex domicilii* is, if the special form is not observed, invalid. *Warner v. Jaffray*, 96 N. Y. 248. See *Forbes v. Scannell*, 13 Cal. 241.

CHAPTER XXIV.

CONTRACTS.¹ — GENERAL RULES.

(A) PRELIMINARY.

RULE 143.² — In this Digest the term “proper law of a contract” means the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed;³ or (in other words) the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves.

Comment.

A contract is a promise, or set of promises, enforceable, or intended at any rate to be enforceable, by law. The parties to a contract must always, therefore, intend, or be presumed to intend, that it shall be subject to, or governed by, the law of some country, *e. g.*, England, or, it may be, that part of the contract shall be governed by the law of one country, *e. g.*, of England, where it is made, and part of the contract by the law of another country, *e. g.*, of Scotland, where it is to be performed.⁴ The law or laws

¹ *Story*, chap. viii., especially ss. 241–373; *Westlake*, 3rd ed., chap. xii., pp. 249–274; chap. xiii., pp. 275–283; *Foote*, 2nd ed., chap. viii., pp. 322–470; *Wharton*, chap. viii., ss. 393–546; *Pollock*, *Principles of Contracts*, 6th ed., pp. 369–377; *Savigny* (*Guthrie's transl.*, 2nd ed.), ss. 369–374, pp. 194–272; *Bar* (*Gillespie's transl.*, 2nd ed.), ss. 247–284, pp. 536–630.

² For the substance of this definition, see *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115, 122, 123, *per Curiam*, judgment delivered by Willes, J.; *In re Missouri Steamship Co.* 1889, 42 Ch. D. (C. A.) 321, 336, judgment of Halsbury, Ch. Compare comment on Rule 148, p. 553, *post*. See also, *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

³ Or, more accurately, though in more cumbersome language, “the law of “the country, or the laws of the countries, by the law or the laws whereof the “parties to a contract intended, or may fairly be presumed to have intended, “the contract to be governed.”

⁴ *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

by which it is intended that a contract shall be governed may be conveniently termed the "proper law of a contract."¹

Illustrations.

1. A Scotchman and an Englishwoman marry in England. It is provided by the terms of their marriage contract that the contract shall be governed by the law of Scotland. The law of Scotland is the proper law of the contract.²

2. A Scotchman domiciled in Scotland marries in England a Scotchwoman also domiciled in Scotland. The marriage contract or settlement is, before their marriage, executed in England. It is in the Scotch form. The law of Scotland is the proper law of the contract.

3. X, an English underwriter, enters into an English policy of insurance with A, an English shipowner. It is part of the terms of the policy that a particular term in it shall be interpreted in accordance with French law. The law of England and the law of France, to the extent intended by the policy, constitute the proper law of the contract.

RULE 144.³ — Where any Act of Parliament intended to have extra-territorial operation makes any contract, —

(1) valid, or

(2) invalid,

the validity or invalidity, as the case may be, of such contract must be determined in accordance with such Act of Parliament, independently of the law of any foreign country whatever.⁴

¹ As to the rules for ascertaining the intention of the parties, or, in other words, for determining what is the "proper law," see Rule 149, and Sub-Rules 1-3, pp. 563-575, *post*.

² Compare *Chamberlain v. Napier*, 1880, 15 Ch. D. 614.

³ See Intro., General Principle No. II. (A), p. 32, *ante*.

⁴ For examples of such Acts determining —

Capacity, see 5 & 6 Will. IV. cap. 54; *Brook v. Brook*, 1861, 9 H. L. C. 193; The Royal Marriage Act, 1772, 12 Geo. III. cap. 11; *The Sussex Peerage Case*, 1844, 11 Cl. & F. 85.

Form, see the Foreign Marriage Acts, *e. g.*, 54 & 55 Vict. cap. 74, s. 1; *Este v. Smyth*, 1854, 18 Beav. 112; 23 L. J. Ch. 705; Bills of Exchange Act, 1882 (45 & 46 Vict. cap. 61), s. 72.

Legality, see Slave Trade Acts, 5 Geo. IV. cap. 113; 7 Will. IV. & 1 Vict. cap. 91; 6 & 7 Vict. cap. 98; 36 & 37 Vict. cap. 88.

Comment.

Sometimes, though not often, an Act of Parliament lays down a positive rule as to the validity or invalidity of a contract wherever made. Whenever an Act of Parliament thus validates or invalidates a contract, a British Court must obey the enactment, without considering the effect of any foreign law which might otherwise be applicable to the case.

Illustrations.

1. A British subject marries a Frenchwoman at Paris. The marriage is celebrated in accordance with the provisions of the Foreign Marriage Act, 1892. The marriage is invalid in France for want of compliance on the part of the woman with the formalities required by French law. The marriage is valid, *i. e.*, its validity is determined solely by reference to the provisions of the Foreign Marriage Act, 1892.¹

2. A member of the British Royal Family marries a foreign woman in a foreign country, in contravention of the provisions of the Royal Marriage Act, 12 Geo. III. cap. 11, which apply to members of the Royal Family wherever and under whatever circumstances they marry. The marriage, whether valid or not by the law of the foreign country, is invalid, *i. e.*, its validity is determined solely by reference to the Royal Marriage Act.²

3. A British subject, when in a foreign country, lends money to be employed in slave trading, in contravention of the Slave Trade Act, 1824 (5 Geo. IV. cap. 113), s. 2, and the Slave Trade Act, 1843, 6 & 7 Vict. cap. 98. The contract, whether lawful by the law of the foreign country or not, is invalid.³

RULE 145.⁴ — A contract otherwise valid cannot be enforced if its enforcement is opposed to any English rule of procedure.⁵

¹ See *Este v. Smyth*, 1854, 18 Beav. 112; 23 L. J. Ch. 705. See further, chap. xxvi., Rule 169, p. 626, *post*.

² *The Sussex Peerage Case*, 1844, 11 Cl. & F. 85.

³ Compare *Reg. v. Zulueta*, 1843, 1 C. & K. 215.

⁴ See *Bristow v. Sequeville*, 1850, 5 Ex. 275; 19 L. J. Ex. 289; *Leroux v. Brown*, 1852, 12 C. B. 801. Conf. *Gibson v. Holland*, 1865, L. R. 1 C. P. 1. See Intro., General Principle No. II. (B), p. 32, and see pp. 35, 36, *ante*.

⁵ As to wide meaning of term "procedure," see chap. xxxi., Rule 188, *post*.

Illustration.

X at Calais orally engages *A* to serve him as a clerk for more than a year; there is no written memorandum of the contract. The agreement, though not in writing, is valid by French law. But under the fourth section of the Statute of Frauds no action can be brought on such a contract unless there is a memorandum thereof in writing. *A* cannot enforce the contract in England against *X*.¹

(B) VALIDITY OF CONTRACT.

(i) Capacity.

RULE 146.² — Subject to the exceptions hereinafter mentioned, a person's capacity to enter into a contract is governed by the law of his domicile (*lex domicilii*) at the time of the making of the contract.

- (1) If he has such capacity by that law, the contract is, in so far as its validity depends upon his capacity, valid.³
- (2) If he has not such capacity by that law, the contract is invalid.

Comment.

The general principle of English law seems now to be that a person's capacity to contract, or in other words to bind himself by a promise, is governed by the law of the country where he is domiciled.

¹ Compare *Leroux v. Brown*, 1852, 12 C. B. 801; 22 L. J. C. P. 1; *Gibson v. Holland*, 1865, L. R. 1 C. P. 1.

² See *Westlake*, 3rd ed., chap. iii., pp. 43–48; *Foote*, 2nd ed., pp. 47–50; *Nelson*, pp. 244, 256, 257. Compare *Story*, ss. 64, 81, 82. It should be added that the view of these writers is expressed in very doubtful terms; and *Foote* and *Story*, at any rate, seem to incline to the doctrine that contractual capacity is governed by the law of the country where the contract is made (*lex loci contractus*). *Re Da Cunha*, 1828, 1 Hagg. Eco. 237; *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1; *Re Cooke's Trusts*, 1887, 56 L. J. Ch. 637; *Cooper v. Cooper*, 1888, 13 App. Cas. 88.

Note that this Rule has no reference to contracts with regard to land. See Rule 138, p. 516, *ante*. See, as to "status," Rules 122–126, pp. 474–485, *ante*.

³ It may, of course, be invalid on other grounds, *e. g.*, the not being made in due form. See Rule 147, p. 549, *post*.

The authoritative dicta in favour of the *lex domicilii* are strong.

"It is a well-recognised principle of law," says the Court of Appeal in *Sottomayor v. De Barros*, "that the question of personal capacity to enter into any contract is to be decided by the law of domicil. . . . As in other contracts, so in that of marriage, personal capacity must depend on the law of domicil."¹

So, again, in a case the decision of which turned upon the capacity of an Irishwoman, aged 18, and domiciled in Ireland, to bind herself by a contract there made with her future husband whilst she was still an infant under Irish law, Lord Halsbury thus lays down the law as to capacity: "None of these cases [*i. e.*, cases "with reference to dower] relate to the question of incapacity to contract by reason of minority, and the capacity to contract is regulated by the law of domicil. Story has, with his usual precision, laid down the rule² that, if a person is under an incapacity to do any act by the law of his domicil, the act when done there will be governed by the same law wherever its validity may come into contestation with any other country: *quando lex in personam dirigitur respiciendum est ad leges illius civitatis quæ personam habet subjectam*."

"There is an unusual concurrence in this view among the writers of international law. . . . It is said that the familiar exception of the place where the contract is to be performed prevents the application of the general rule. . . . But [an] . . . overwhelming answer is to be found in this, that the argument assumes a binding contract, and if one of the parties was under incapacity the whole foundation of the argument fails."³

These dicta lay down the broad rule of English law in reference to contractual capacity.⁴ A person's capacity to contract marriage, or to enter into any contract connected with marriage, certainly depends upon the law of his or her domicil at the time of the celebration of the marriage or of the making of the con-

¹ *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1, 5, *per Curiam*; and compare *In re Cooke's Trusts*, 1887, 56 L. J. Ch. 637, 639, judgment of *Stirling, J.*, and *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 457, judgment of Lord *Westbury*.

² *Conflict of Laws*, s. 64.

³ *Cooper v. Cooper*, 1888, 13 App. Cas. 88, 99, 100, *per Halsbury, Ch.*

⁴ Compare *In re Cooke's Trusts*, 1887, 56 L. J. Ch. 637, 639, judgment of *Stirling, J.*; but contrast the criticisms in *Sottomayor v. De Barros*, 1879, 5 P. D. 94, 100, 101, of Sir *J. Hannen*, on *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1.

tract.¹ It is further at least possible, though not certain, that, as implied in the dicta already cited, a person's capacity to bind himself by an ordinary contract also depends upon his *lex domicilii*.²

Illustrations.

1. A Portuguese man and a Portuguese woman are first cousins; they reside in England, but are domiciled in Portugal. By the law of Portugal they are under an incapacity to marry one another. They are incapable of intermarriage in England, *i. e.*, their capacity is governed by the law of their domicile.³

2. An Englishwoman, domiciled in England, is an infant. Previously to her marriage she enters with her intended husband, a Frenchman domiciled in France, into a notarial contract made in France dealing with her property according to French law. They intermarry in France. Her capacity to make the notarial contract is governed by English law. As she is an infant, the contract is invalid.⁴

3. A girl of 18, domiciled in Ireland, is engaged to marry a Scotchman domiciled in Scotland; it is contemplated that they should reside, and they do in fact after their marriage reside, in Scotland. She executes in Ireland an ante-nuptial contract with her intended husband whereby her rights to property after the marriage are regulated. Her capacity to make this ante-nuptial contract is governed by Irish law (*lex domicilii*);⁵ and as she under such law was, being an infant, incapable of binding herself by a contract not to her advantage, the ante-nuptial settlement is invalid,⁶ *i. e.*, is voidable by her.⁷

4. In 1844 an Englishwoman married to a French husband, whose domicile is French, enters in England, after her marriage, and therefore when domiciled in France, into a contract with respect to her reversionary interests in trust moneys invested in the English funds. The contract is in substance valid according

¹ *In re Cooke's Trusts*, 1887, 56 L. J. Ch. 637; *Cooper v. Cooper*, 1888, 13 App. Cas. 88. See as to capacity to contract marriage, chap. xxvi., Rules 169, 170, pp. 626, 642, *post*; and note Exception 1, p. 646, *post*.

² See Exception 1, p. 546, *post*.

³ *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1.

⁴ *In re Cooke's Trusts*, 1887, 56 L. J. Ch. 637.

⁵ Note that it was also *lex loci contractus*. Whether this affects the validity of the contract?

⁶ *Cooper v. Cooper*, 1888, 13 App. Cas. 88.

⁷ *Duncan v. Dixon*, 1890, 44 Ch. D. 211.

to French law, but, if governed by English law, is invalid on account of the woman's incapacity to contract. The contract is valid, *i. e.*, the woman's contractual capacity is governed by the law of her domicile.¹

5. A Frenchwoman is married to an Englishman domiciled in England. She purchases goods from a tradesman in a foreign country. By the law of the country where the contract is made (*lex loci contractus*), she incurs the same liability for the price of the goods as an unmarried woman. She is sued for the price in England. Her capacity to contract, and therefore her liability, is (semble) governed by the Married Women's Property Act, 1882, as amended by the Married Women's Property Act, 1893 (*lex domicilii*).²

6. X, a man of 20, is domiciled in England. When in a foreign country, where a man attains his majority at the age of 20, he incurs a debt for the price of jewels sold to him. By the law of the foreign country he is liable for the price of the jewels. An action is brought for the debt in England. His capacity (semble) is governed by the law of England. Being under English law an infant, he is incapable of contracting to pay for the jewels and is not liable for the price (?).³

Exception 1. — A person's capacity to bind himself by an ordinary mercantile contract is (probably) governed by the law of the country where the contract is made (*lex loci contractus*) (?).⁴

Comment.

"It has been doubted whether the personal competency or "incompetency of an individual to contract depends on the law "of the place where the contract is made, or on the law of the

¹ *Guépratte v. Young*, 1851, 4 De G. & Sm. 217.

² A question may be raised as to how far the Married Women's Property Acts in strictness touch the question of capacity at all.

³ If capacity depends on the *lex domicilii*, X is clearly not liable. The Infants' Relief Act, 1874, s. 1, moreover, is, perhaps, a law affecting procedure (see chap. xxxi., Rule 188, *post*, and compare Rule 145, p. 542, *ante*), and therefore a bar to an action against X for the price of the jewels. There may be a distinction in this matter between s. 1 and s. 2 of the Infants' Relief Act, 1874.

⁴ See *Male v. Roberts*, 1800, 3 Esp. 163; *Stephens v. McFarland*, 1845, 8 Ir. Eq. Rep. 444; *Re D'Orleans*, 1859, 1 Sw. & Tr. 253; *Guépratte v. Young*, 1851, 4 De G. & S. 217; *Sottomayor v. De Barros*, 1879, 5 P. D. 94, 100, 101, language of Sir J. Hannen.

Compare especially, *Foote*, pp. 49, 50, and *Westlake*, pp. 44-47.

“place where the contracting party is domiciled. Perhaps in this country the question is not finally settled, though the preponderance of opinion here as well as abroad seems to be in favour of the law of the domicil. It may be that all cases are not to be governed by one and the same rule.”¹

These words exactly express the doubt which exists as to the law governing a person's contractual capacity. On the one hand it is certain that, in accordance with Rule 146,² capacity to marry, or to enter into a contract connected with marriage, depends on the *lex domicilii* of the contracting party; and it is further clear that the language judicially used in *Sottomayor v. De Barros*³ implies that a person's *lex domicilii* governs his capacity to enter into any contract whatever. On the other hand there are strong grounds for holding that capacity to enter into an ordinary mercantile contract, *e. g.*, for a loan, or for the purchase or sale of goods, is governed, not by the *lex domicilii* of the contracting party, but by the law of the place where the contract is made (*lex loci contractus*). Story certainly holds to this opinion.⁴ In one reported case, where the point is distinctly raised though not precisely decided, Lord Eldon held in regard to a contract made by an English infant in Scotland that the effect of infancy, as a defence to an action on the contract, depended upon the law of Scotland. To this may be added that to allow the validity of an ordinary contract made in England by a person domiciled abroad to depend upon the law of his domicil would often lead to inconvenience and injustice. It would certainly be strange if an Englishman of the age of 24, who happened to be domiciled in a country where the age of majority is fixed at 25, could escape liability for the price of goods bought by him from a tradesman in London by pleading that he was a minor under the law of his foreign domicil and not liable for the price of the goods.

Illustrations.

1. *X*, an infant domiciled in England, is when in a foreign country arrested for a debt there incurred. *A* pays it for him. *A* brings an action against *X* in England for the money so paid.

¹ *Cooper v. Cooper*, 1888, 13 App. Cas. 88, 108, per Lord Macnaghten.

² See p. 543, *ante*, and see further, as to capacity to marry, chap. xxvi., Rules 169, 170, pp. 626, 642, *post*.

³ See p. 544, *ante*.

⁴ See *Story*, s. 82.

Semble, *X*'s capacity to incur the debt to *A* is governed by the law of the foreign country.¹

2. *X*, an infant domiciled in England, enters when in Scotland into a contract to serve *A*, a domiciled Scotchman, for six months. *X*'s capacity to enter into the contract is (semble) governed by the law of Scotland.²

3. *X*, a man of 21, is an Englishman residing in England. He is domiciled in a foreign country where minority lasts till the age of 22. He incurs a debt to a tradesman in England which he is not capable of incurring under the law of his domicile. He is sued for the debt in England. His capacity to contract, and therefore his liability for the debt, is (semble) determined by the law of England.³

4. *X*, a man of 18, domiciled in Russia, accepts [in England?] a bill of exchange. An infant is not capable of binding himself by a bill of exchange according to the law of England. *X*'s capacity to accept the bill (semble) is governed by the law of England, and he is not liable on the bill.⁴

Exception 2. — A person's capacity to contract in respect of an immovable (land) is governed by the *lex situs*.⁵

¹ Compare *Male v. Roberts*, 1800, 3 Esp. 163; 6 R. R. 823. "It appears, "from the evidence in this cause, that the cause of action arose in Scotland; "the contract must be, therefore, governed by the laws of that country where "the contract arises. Would infancy be a good defence, by the law of Scotland, had the action been commenced there?" 3 Esp. 164, and 6 R. R. 823, per *Eldon*, Ch.

"The law of the country where the contract arose must govern the contract; "and what that law is should be given in evidence to me as a fact. No such "evidence has been given; and I cannot take the fact of what that law is, "without evidence." 3 Esp. 164, 165; 6 R. R. 824.

In *Male v. Roberts* the domicile of the infant is not stated, but, semble, was English. Illustration 1 gives the facts in *Male v. Roberts*, but that case, if it now arose, might be affected by the Infants' Relief Act, 1874 (37 & 38 Vict. cap. 62), s. 1. Illustration 2 is suggested by *Male v. Roberts*, and clearly does not fall within the Infants' Relief Act.

² *Ibid.*

³ See for a case of this kind brought before the French Courts, *Pellin Ferron v. Santo Venia*, *Journal du Droit International Privé*, v., p. 502; and compare *Bar* (*Gillespie's transl.*, 2nd ed.), ss. 133-144, especially s. 142.

⁴ Suggested by *In re Soltykoff*, [1891] 1 Q. B. (C. A.) 413. The case is very briefly reported, and the infant's domicile is not stated. But it seems to have been assumed that his liability in any case depended on the law of England. Compare *Chalmers, Bills of Exchange*, 4th ed., pp. 60, 61.

⁵ See pp. 516, 517, *ante*.

(ii) *Form.*

RULE 147.¹ — Subject to the exceptions hereinafter mentioned, the formal validity of a contract is governed by the law of the country where the contract is made (*lex loci contractus*).

- (1) Any contract is formally valid which is made in accordance with any form recognised as valid by the law of the country where the contract is made (which form is in this Digest called the local form).²
- (2) No contract is valid which is not made in accordance with the local form.³

Comment.

The one principle of English law with regard to the law regulating the form of a contract, or the formalities in accordance with which a contract is made, is that the form depends, both affirmatively and negatively, upon the law of the country where the contract is made (*lex loci contractus*). "The formalities required for a contract by the law of the place where it was made, the *lex loci contractus celebrati*, are sufficient for its external validity in England,"⁴ and "the formalities required for a contract by the law of the place where it was made, the *lex loci contractus celebrati*, are also necessary for its validity in England."⁵

Any difficulty which may arise in the application of this principle is generally due⁶ to one of two causes, neither of which has any special relation to the principles of private international law :

¹ *Westlake*, pp. 249-252 ; *Foot*, pp. 352-364 ; *Story*, ss. 260-262 a.

² *Compton v. Bearcroft*, 1769, 2 Hagg. Cons. 430 ; *Dalrymple v. Dalrymple*, 1811, 2 Hagg. Cons. 54 ; *Leroux v. Brown*, 1852, 12 C. B. 801, 824, judgment of *Jervis*, C. J. ; *Brinkley v. Attorney-General*, 1890, 15 P. D. 76.

³ *Bristow v. Sequeville*, 1850, 19 L. J. Ex. 289 ; 5 Ex. 275 ; *Alves v. Hodgson*, 1797, 7 T. R. 241 ; *Clegg v. Levy*, 1812, 3 Camp. 166 ; *Trimbey v. Vignier*, 1834, 1 Bing. N. C. 151 ; *Benham v. Mornington*, 1846, 3 C. B. 133 ; *Kent v. Burgess*, 1840, 11 Sim. 361 ; *In re Estate of M'Loughlin*, 1878, 1 L. R. Irish (Ch.) 421.

⁴ *Westlake*, 3rd ed., p. 249.

⁵ *Ibid.*, p. 251.

⁶ A nice question may also be raised as to the extension to be given to the idea of the "form" of a contract. Does it include, for example, consideration ?

first, there may be a doubt as to what is the place where a given contract is finally completed or made; thus if *X*, living in England, enters into a contract with *A*, living in Germany, by letters sent through the post, there may be a doubt whether the contract is to be considered as made in England, and subject, therefore, as to its form, to the law of England, or made in Germany, and subject, therefore, as to its form, to the law of Germany; secondly, it is in some cases hard to determine whether a given formality, *e. g.*, the necessity for a stamp, belongs to the form of a contract, in which case it is governed by the law of the place where the contract is made, or to the evidence of a contract, in which case the necessity for the stamp is a matter of procedure, and is governed, not by the law of the country where the contract is made (*lex loci contractus*), but by the law of the country where an action on the contract is brought, or, speaking more generally, where legal proceedings are taken to enforce the contract (*lex fori*).

The general rule, however, whatever the difficulties in its application, is clear. A contract made in one country, *e. g.*, France, even though performable in another, *e. g.*, England, is, as far as its form goes, valid in England if made in a manner required or permitted by French law, and is invalid in England if not made in a manner required or permitted by the law of France, and this is so even though the contract be made in the form required by English law for the validity of a contract of the same kind when made in England.

Illustrations.

1. An Englishman passes four weeks in Scotland;¹ marries an Englishwoman, who has only just arrived in Scotland, by mere declaration before witnesses. The marriage is in a form allowed by the law of Scotland. The marriage is valid.²

2. An Irishman temporarily resident in Japan marries a Jap-

¹ See 19 & 20 Vict. cap. 96.

² See *Compton v. Bearcroft*, 1769, 2 Hagg. Cons. 430; *Dalrymple v. Dalrymple*, 1811, 2 Hagg. Cons. 54. See chap. xxvi., Rule 169, p. 626, *post*; *Leroux v. Brown*, 1852, 12 C. B. 801, 824, judgment of *Jervis*, C. J. See *Story*, ss. 260-262. The principle, that the formal validity of a contract depends in general upon the observance of the local form, is specially well illustrated by the decisions with regard to the validity of a marriage made in a foreign country. The truth is that the strict adherence of English Courts to the rule, that the form of a contract is governed by the *lex loci contractus*, arises in a great degree from the fact that the earliest English decisions on the subject had reference to the contract of marriage. See App., Note 2, *Preference of English Courts for lex loci contractus*.

anese woman in Japan according to the forms required by the law of the country. The marriage is valid.¹

3. An Englishman and an Englishwoman domiciled in England are married in accordance with the ceremonies of the Church of England in Belgium. The solemnisation of the marriage does not follow the form required by the law of Belgium. The marriage is invalid.²

4. *X* and *A* enter in a foreign country into a contract, which is there void for want of a stamp. The contract is invalid.³

*Exception 1.*⁴ — The formal validity of a contract with regard to an immovable depends upon the *lex situs* (?).

*Exception 2.*⁵ — A contract made in one country in accordance with the local form⁶ in respect of a movable situate in another country may possibly be invalid, if it does not comply with the special formalities (if any) required by the law of the country where the movable is situate at the time of the making of the contract (*lex situs*).

Comment.

The law of a country, *e. g.*, of France, where a movable is situate may require for the validity of any contract with regard to such movable that it should be made in a particular form, *e. g.*, be in writing or be registered. In this case it is possible, though not certain, that such a contract, though made in another country, *e. g.*, in England, would be held by an English Court invalid if it did not conform to the formalities required by the law of France. The subject, however, is one on which there is a want of authority, and the consideration of it is complicated by the fact that a contract with regard to a movable is often not only a contract but also an assignment. It is, however, pretty certain that a contract with regard to land or immovables⁷ is not valid if it does not comply with the forms, if any, required for its validity by the *lex situs*, and the increasing tendency of English decisions clearly is to diminish the distinction between the rules governing

¹ *Brinkley v. Attorney-General*, 1890, 15 P. D. 76. See chap. xxvi., Rule 169, p. 626, *post*.

² *Kent v. Burgess*, 1840, 11 Sim. 361.

³ *Bristow v. Sequeville*, 1850, 5 Ex. 275 ; 19 L. J. Ex. 289. Compare *Alves v. Hodgson*, 1797, 7 T. R. 241.

⁴ See pp. 517, 518, *ante* ; *Adams v. Clutterbuck*, 1883, 10 Q. B. D. 403.

⁵ *Robinson v. Bland*, 1760, 2 Burr. 1077.

⁶ For meaning of "local form," see Rule 147, p. 549, *ante*.

⁷ See chap. xxii., p. 516, *ante*.

rights over immovables and the rules governing the rights over movables when situate in a foreign country.

Exception 3. — Possibly a contract made in one country but intended to operate wholly in, and to be subject to, the law of another country, may be valid, even though not made in accordance with the local form, if it be made in accordance with the form required, or allowed, by the law of the country where the contract is to operate, and subject to the law whereof it is made (?).

Comment.

It has been suggested that “if a contract is intended by the parties thereto to be an English contract and transaction, or a contract and transaction of any other country [than the country in which it is made], it will be a good contract and enforceable in England if it complies with the formalities required, if so intended to be an English contract, by the law of England, or, if so intended to be a contract of some other country, with the formalities required by the law of such country.”¹

This suggestion of Mr. Nelson’s cannot be supported by adequate authority, but it is in itself reasonable, and falls in with the tendency² of English Courts to refer every question connected with a contract to the law by which the parties intended the contract to be governed. There are, moreover, one or two cases which are best explained by admitting this possible Exception to Rule 147.³

Illustrations.

A Frenchman domiciled in France marries an Englishwoman resident in France, but domiciled in England. The marriage takes place in France. Before the marriage a settlement is executed by the parties in France of property of the woman in England. The settlement is made according to the form and in the manner required by the law of England, but not in conformity with the formalities required by the law of France. If governed by the law of France, the settlement would be void; if governed

¹ See *Nelson*, pp. 257, 258.

² See, e. g., *Re Marseilles Extension Co.* 1885, 30 Ch. D. 598; *In re Missouri Steamship Co.* 1889, 42 Ch. D. (C. A.) 321.

³ “With regard to form, it may be that a contract for the employment of a ship, which has been effectually made according to the law of her flag, would be considered valid although not completed with all the forms required by the law of the place of the contract.” *Carver, Carriage by Sea*, pp. 212, 213. See *Van Grutten v. Digby*, 1862, 31 Beav. 561; 32 L. J. Ch. 179.

by the law of England, the settlement would be valid. The settlement is valid.¹

Exception 4. — In certain cases a bill of exchange may be treated as valid, though it does not comply with the requirements, as to form, of the law of the country where the contract is made.²

(iii) *Essential Validity.*

RULE 148.³ — The essential validity of a contract is (subject to the exceptions hereinafter mentioned) governed indirectly by the proper law⁴ of the contract.

Comment.

A contract, though made by persons competent to contract,⁵ and though formally valid,⁶ may nevertheless, on account of something in the nature of the contract itself, be wholly or partially invalid. It may, that is to say, be a contract to which, on

¹ *I. e.*, in England. *Van Grutten v. Digby*, 1862, 31 Beav. 561; 32 L. J. Ch. 179.

"I hold it to be the law of this country that if a foreigner and English-woman make an express contract previous to marriage, and if on the faith of that contract the marriage afterwards takes place, and if the contract relates to the regulation of property within the jurisdiction and subject to the laws of this country, then and in that case this Court will administer the law on the subject as if the whole matter [including the formal validity of the contract] were to be regulated by English law." Per *Romilly*, M. R., 31 Beav. p. 567.

² See chap. xxv., Rule 160, (1) a and b (p. 602, *post*), and Bills of Exchange Act, 1882, s. 72. See also, Rule 144, p. 541, *ante*.

³ *Robinson v. Bland*, 1760, 2 Burr. 1077; *Santos v. Illidge*, 1860, 8 C. B. N. s. 861 (Ex. Ch.); *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115; *The Gaetano*, 1882, 7 P. D. (C. A.) 137; *Chartered Bank of India v. Netherlands Co.* 1882, 9 Q. B. D. 118; 1883, 10 Q. B. D. (C. A.) 521; *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589; *In re Missouri Steamship Co.* 1889, 42 Ch. D. (C. A.) 321. *The August*, [1891] P. 328; *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

Compare *Westlake*, pp. 258, 259; *Nelson*, pp. 261–266; *Foote*, pp. 364–375. Rule 148 agrees, I think, in substance with the view of *Westlake* and *Nelson*, but not with that of *Foote*. See App., Note 12, *What is the Law determining the Essential Validity of a Contract?*

⁴ For the meaning of "proper law of a contract," see Rule 143, p. 540, *ante*; and see Rule 149, p. 563, *post*, and Sub-Rules thereto, pp. 567–569, *post*.

⁵ See Rule 146, p. 543, *ante*.

⁶ See Rule 147, p. 549, *ante*.

account of its terms or of its nature, the law refuses to give effect. It then lacks "essential" or "material" validity.¹

This defect may arise from the contract being strictly unlawful, *i. e.*, from its being one which the law actually forbids; such, under the law of England, is a contract for the promotion of the slave trade, or a contract which, as being tainted with champerty or maintenance, tends to pervert the due course of justice.² The defect, again, may arise from the contract being one which, though not strictly forbidden, is made void or voidable by law; such, under the law of England, is a gratuitous promise, when not made under seal, and such is a contract in restraint of trade.

The laws, however, of different countries differ as to the contracts which they render invalid. Thus a contract by an attorney to conduct an action on the terms of sharing the damages (if any) which are recovered, though void under the law of England,³ may be perfectly valid under the law of a foreign country, and a gratuitous promise, though as a rule void under the law of England, is legally binding under the law of many foreign countries.

When, therefore, a contract contains any foreign element (*i. e.*, whenever there is a possible choice of law), the question may arise, What is the law which governs the material validity of the contract? The reply to this inquiry is admittedly open to some doubt, but the answer to be drawn from the reported decisions of English Courts is (it is submitted) given in Rule 148. The essential validity of a contract is, subject to very wide exceptions, indirectly at any rate, determined by the proper law of the contract,⁴ that is, by the law or laws to which the parties when contracting intended, or may fairly be presumed to have intended, to submit themselves. The same conclusion may be put in a different shape, and be expressed in terms more nearly corresponding with the language used by English judges. When the question arises whether a given contract, or part of a given contract, made in one country, *e. g.*, England, and to be performed wholly or partially in another, *e. g.*, France, is or is not valid, our Courts are accustomed to consider whether the contract is an "English contract"⁵ or a "French contract." If it is an "English con-

¹ The same sort of invalidity may, of course, exist in the case of instruments which are not contracts, *e. g.*, wills.

² *Pollock, Contracts*, 6th ed., p. 319.

³ *Grell v. Levy*, 1864, 16 C. B. N. S. 73.

⁴ For the meaning of "proper law of the contract," see Rule 143, p. 540, *ante*.

⁵ It is usual and convenient to describe a contract as the contract of the country which supplies its proper law. Thus an "English contract" means a

tract," they hold that its validity is in general governed by the law of England; if it is a "French contract," they hold that its validity is in general governed by the law of France. But the answer to the question whether a given agreement is to be considered an English contract or a French contract, though in the eyes of English judges it does not depend exclusively upon any one circumstance (*e. g.*, the place where the contract is made, or the place where the contract is to be performed),¹ does depend upon the intention of the parties as to the law by which the contract is to be governed, or, in other words, upon the proper law of the contract.²

Considerations limiting effect of Rule. — This statement, that the proper law of a contract determines its material validity, must be taken subject to the following limitations: —

First. The intention which determines the proper law, and therefore in general³ the validity, of a contract, is the intention of the parties (exhibited usually by their conduct and the nature of the agreement) actually and in fact to contract with reference to the law of a given country, *e. g.*, England.

This intention is a quite different thing from the intention, which in the absence of fraud, or the like, must always exist, that a contract shall be valid; it is a different thing also from the intention that a contract made in fact under the law of one country shall as to its validity be governed by the law of some other country. This is clearly a result which cannot be effected by the will of the parties.⁴

Secondly. The "proper law" of a contract is, in a great number of instances, the law of the country where the contract is to be performed (*lex loci solutionis*). The assertion, therefore, of many writers, that the essential validity of a contract is governed by the

contract which the parties intend to be governed by the law of England. A French contract" means a contract which the parties intend to be governed by the law of France.

¹ See *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589; *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

² See App., Note 12, *What is the Law determining the Essential Validity of a Contract?*

³ See Exceptions 1-3, pp. 558-560, *post*, for cases where the validity of a contract does not depend upon its proper law.

⁴ As to the determination of the proper law of a contract, see Sub-Rules to Rule 149, pp. 567-569, *post*. See also, App., Note 12, *What is the Law determining the Essential Validity of a Contract?* A contract, be it noted, may, as to some of its terms, be governed by the law of one country, *e. g.*, England, and as to others by the law of another country, *e. g.*, Scotland. *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

law of the place of performance, does not in its results differ greatly from our Rule.

Thirdly. The Exceptions to Rule 148 are of a very wide character, and greatly limit the application of the principle that the essential validity or legality of a contract is determined by its proper law.

Illustrations.

1. In 1858 *X*, a British subject domiciled in England, makes in Brazil a contract, then lawful by the law of Brazil, for the sale to *A*, a Brazilian domiciled in Brazil, of slaves who, under the law of Brazil, are lawfully held there by *X*. The contract is to be performed in Brazil. Brazilian law is the proper law of the contract. The contract is held in England lawful and valid.¹

2. In 1842 *A* lends money to *X* in France to gamble at public tables, and also wins money from him there at cards in sums below £10. The contract is at that date unlawful by English law, but not by French law. The law of France is the proper law of the contract. The contract is valid.²

3. By a charter party entered into at Boston, Mass., by *X & Co.*, a company incorporated in England, with *A* for the shipment of cattle in an English ship to England, it is provided (*inter alia*) that "*X & Co.* shall not be liable for negligence of master or crew." Such provision is valid by English law (law of flag), but is invalid by the law of Massachusetts. Cattle are injured on the coast of Wales through negligence of master or crew. English law is the proper law of the contract. The provision is valid, and *X & Co.* are not liable for the damage.³

4. A bond is made by *X*, the master of a foreign ship, hypothecating cargo laden on board the ship. The bond is valid according to its proper law, *i. e.*, the law of the country to which the ship belongs, but is not valid according to English law. The bond is valid in England, *i. e.*, its validity is determined in accordance with its proper law.⁴

5. In 1892 *X*, residing in Scotland, enters in England into a

¹ *Santos v. Illidge*, 1860, 8 C. B. N. S. 861; 29 L. J. C. P. 348.

² *Quarrier v. Colston*, 1842, 1 Phillips, 147. The date is important because, since 8 & 9 Vict. cap. 109, s. 18, no action could be brought on such a contract, wherever made, in England. The action is prohibited by a rule of procedure. See Rule 144, p. 541, *ante*, and Rule 188, p. 711, *post*.

³ *In re Missouri Steamship Co.* 1889, 42 Ch. D. 321, and (C. A.) 330.

⁴ *The Gaetano*, 1882, 7 P. D. (C. A.) 137. See further, chap. xxv., Rule 154, p. 590, and Sub-Rule, p. 593, *post*.

contract with *A*, which is to be performed, as to most of its terms, in Scotland. The contract contains this clause: "Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." The clause is then void under the law of Scotland, but valid under the law of England. The law of England is, as regards the arbitration clause, the proper law of the contract, and the arbitration clause is valid.¹

6. *X* and *A* are Scotchmen domiciled in Scotland. They are sailing on Loch Katrine. The boat capsizes, and *A* saves *X*'s life at the risk of his own. *X*, soon afterwards, and without any other consideration than that of gratitude, promises *A* in writing to pay him £1,000. *X* has property both in England and in Scotland. He goes to England and refuses to pay the £1,000. If the contract is governed by Scotch law² it is valid, and *X* is liable to pay the £1,000. If it is governed by English law, the contract is void, and *X* is not liable to pay the £1,000. Semble,³ the law of Scotland is the proper law of the contract and the contract is valid, *i. e.*, *X* is in England, as in Scotland, liable to an action for the £1,000.

7. *X* and *A* are Englishmen domiciled in England, but travelling for a week's tour in Scotland. *A*, in Edinburgh, saves *X*'s life at the risk of his own, and *X* soon afterwards, and whilst in Scotland, promises *A* in writing to pay him £1,000 as a mark of *X*'s gratitude. They both return to England. *X* refuses to pay the £1,000. The law of England (semble) is the proper law of the contract and the contract is invalid, *i. e.*, *X* is not liable in England to an action for the £1,000.⁴

8. *X* and *A*, Scotchmen domiciled in Scotland, are travelling for a week's tour in England. *A*, in London, saves *X*'s life at the risk of his own, and *X* soon afterwards, and whilst in England, promises *A* in writing to pay him £1,000 as a mark of *X*'s gratitude. *X* later refuses to pay the £1,000. Whether the

¹ *Hamlyn v. Talisker Distillery*, [1894] A. C. 202. This is a particularly strong case, as it was decided by the House of Lords, when sitting as a Scotch Court of Appeal, with regard to an action brought in Scotland.

² See *Patterson, Compendium*, ss. 441, 435.

³ There is no reported case known to me deciding the points raised in Illustrations 6 to 8, but there is some slight authority for the statement that a contract which would be void for want of consideration if it were an English contract will, if made abroad and performable in a foreign country under the law of which it is valid, support an action in England. *Scott v. Pilkington*, 1862, 2 B. & S. 11; 31 L. J. Q. B. 81.

⁴ Nor, semble, in Scotland.

proper law of the contract is the law of Scotland or the law of England, and whether the contract is valid or not?

*Exception 1.*¹—A contract (whether lawful by its proper law or not) is invalid² if it, or the enforcement thereof, is opposed to English interests of state, or to the policy of English law, or to the moral rules upheld by English law.

Comment.

English Courts cannot be used to enforce contracts which violate English law, or which are opposed to English interests of state, to the general policy of English law, or, if we may use a very vague term, to the morality upheld by English law.³ This principle has thus been stated with reference to a particular case:

It has been “insisted that, even if the contract was void by the “law of England as against public policy, yet, inasmuch as the “contract was made in France, it must be good here, because the “law of France knows no such principle as that by which unreasonable contracts in restraint of trade are held to be void in this “country. It appears to me, however, plain on general principles that this Court will not enforce a contract against the public policy of this country, wherever it may be made. It seems “to me almost absurd to suppose that the Courts of this country “should enforce a contract which they consider to be against “public policy simply because it happens to have been made “somewhere else.”⁴

Illustrations.

1. *X*, residing in England, contracts with *A* for loans to assist the subjects of a foreign state in prosecuting a war against a government in amity with the English Crown. The contract is opposed to English interests of state, and invalid.⁵

2. *X*, a Frenchman, contracts with *A*, also a Frenchman, in France for the supply of money to raise a rebellion in Alsace against the German Government, then in amity with the English Crown. The enforcement of the contract (semble) is opposed to English interests of state, and the contract is invalid.

¹ See especially, *Nelson*, p. 261, and Intro., General Principle No. II. (B), p. 32, *ante*.

² *I. e.*, in England.

³ See on this point, *Pollock, Contracts*, 6th ed., chap. vii.; *Foote*, 2nd ed., pp. 371–374.

⁴ *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351, 369, judgment of *Fry*, J.

⁵ *De Wütz v. Hendricks*, 1824, 2 Bing. 314.

3. *X* in France enters into an agreement with *A* that *A* shall conduct an action for *X* in England on the terms of *A* being paid for his work by a share of the damages, if any, to be recovered by *X* in the action. Such an agreement is lawful by the law of France. The contract is opposed to the policy of English law and invalid.¹

4. In 1857 a husband and wife, British subjects, are domiciled in France. They enter in France into an agreement for the collusive conduct of a divorce suit in England, and for the abandonment by the husband of the custody of his children. The agreement, whether valid by the law of France or not, is opposed to the moral rules upheld by English law and invalid.²

5. *X* contracts with *A*, a courtesan, for the price of her prostitution. The contract is lawful in the foreign country where it is made and is to be performed. It is opposed to the moral rules upheld by English law and invalid.³

Exception 2. — A contract (whether lawful by its proper law or not) is invalid if the making thereof is unlawful by the law of the country where it is made (*lex loci contractus*) (?).⁴

Comment.

"I put aside," says Lord Halsbury, . . . "questions in which the positive law of the country forbids contracts to be made. Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it."⁵

"The question of legality may arise," writes Mr. Foote,⁶ "with reference to the contracting of the agreement, and not to its performance. The consideration, on one side or the other, may either be an unlawful thing in itself to exchange for any

¹ *I. e.*, in England. See *Grell v. Levy*, 1864, 16 C. B. N. S. 73.

² *Hope v. Hope*, 1857, 8 De G. M. & G. 731.

Part at least of the agreement is unlawful by the law of the country where it is to be performed. See *Pollock*, 6th ed., 375.

³ See *Robinson v. Bland*, 1760, 2 Burr. 1077, 1084, dictum of *Wilmot*, J.; *Pollock*, *Contracts*, 6th ed., p. 374.

⁴ See *Foote*, pp. 369–371, with which contrast *Nelson*, p. 266. Compare Intro., General Principle No. I., p. 22, *ante*, and General Principle No. II. (C), p. 33, *ante*.

⁵ *In re Missouri Steamship Co.* 1889, 42 Ch. D. (C. A.) 321, 336, per *Halsbury*, Ch.

⁶ *Foote*, pp. 369, 370.

"promise, or unlawful with reference to the particular promise for which it is given. There is no authority for saying that the question of legality, in such cases as these, is determined by any other law than that of the place where the contract is entered into, except the dictum in *Robinson v. Bland*."¹ If these statements of the law are to be trusted, no contract is valid the making whereof is unlawful by the law of the country where a contract is made (*lex loci contractus*).

Exception 2, however, does not apply to the numerous class of cases where it is not the making of a contract, but the performance thereof in a given country which is there illegal.² The Exception, further, itself, though sound in principle, does not rest on an unassailable foundation of authority.³

Illustration.

X and A contract for the sale and delivery in England by X to A of spirituous liquors. The contract is made in a foreign country where it is unlawful not only to sell spirituous liquors, but to contract for their sale. The parties are Englishmen domiciled in England. Such a contract may be unlawful and invalid in England, but this is doubtful.⁴

*Exception 3.*⁵ — A contract (whether lawful by its proper law or not) is, in general, invalid in so far as

- (1) the performance of it is unlawful by the law of the country where the contract is to be performed (*lex loci solutionis*); or

¹ 2 Burr. 1078.

² Compare *Wharton*, ss. 486, 487.

³ "It does not serve to invalidate a contract, the law of the obligation of which is to be sought in some other country, that it is illegal and void in substance by the law of the place where it is made." *Nelson*, p. 266. If, as would appear at first sight, these words are meant to contradict the principle laid down in Exception 2, I am unable to agree with Mr. Nelson's statement of the law. But it is very probable that he refers to the illegality of the performance of a contract at the place where it is made, and not to the illegality of the making of it there. If so, he may not disagree with the view embodied in Exception 2.

⁴ See App., Note 12, *What is the Law determining the Essential Validity of a Contract?*

⁵ Foote, 2nd ed., pp. 365-369. Compare *Westlake*, 3rd ed., pp. 258-261; *Robinson v. Bland*, 1760, 2 Burr. 1077, 1078; *Rousillon v. Rousillon*, 1880, 14 Ch. D. 351, 369. Compare Intro., General Principle No. II. (C), p. 33, *ante*.

"An obligation is invalid everywhere if the transaction which constitutes the subject of the obligation is an act which is forbidden at the place that is selected as, or is necessarily presumed to be, the place of performance." *Bar*, *Gillespie's transl.*, 2nd ed., p. 557.

(2) the contract forms part of a transaction¹ which is unlawful by the law of the country where the transaction is to take place.

This Exception (semble) does not apply to any contract made in violation, or with a view to the violation, of the revenue laws of any foreign² country not forming part of the British dominions.³

Comment.

This Exception applies to any contract to be performed in England, or forming part of a transaction which is to take place in England.⁴ An English Court will not enforce a contract which directly or indirectly violates the law of England.

Exception 3 must, again, in general apply to any contract, wherever made, the performance whereof would directly or indirectly violate the law of a foreign country where the contract is to be performed, or a transaction of which it forms a part is to be carried out; an English Court will not, in general, enforce a contract which violates, or tends to the violation of, the laws of a foreign country within the limits thereof. Hence an agreement made either in England or in Germany for the doing in France of an act (*e. g.*, the founding of a lottery) forbidden by French law would not support an action in England for breach of contract, or, in other words, the contract would be invalid in England.⁵

¹ *Biggs v. Lawrence*, 1789, 3 T. R. 454; *Clugas v. Penahuna*, 1791, 4 T. R. 466; *Waymell v. Reed*, 1794, 5 T. R. 599; 2 R. R. 675; *Lightfoot v. Tenant*, 1796, 1 B. & P. 552. Compare *Leake, Law of Contracts*, 3rd ed., pp. 664-667.

² "Foreign" in this Digest means not English (see pp. 64, 68, *ante*). Hence a country such as Victoria, which forms part of the British dominions, is a foreign country. For meaning of "country," see pp. 64, 66, *ante*. For meaning of "British dominions," see p. 65, *ante*.

³ *Planché v. Fletcher*, 1779, 1 Doug. 238; *Boucher v. Lawson*, 1735, Cas. Temp. Hardwicke, 85, 89, 195; *Simeon v. Bazett*, 1813, 2 M. & S. 94; *Bazett v. Meyer*, 1814, 5 Taunt. 824. Compare *Nelson*, p. 266, and *Bar*, 2nd ed., note by Gillespie, pp. 559, 560. See *Gelot v. Stewart*, 1871, Ct. Sess. Rep., 3rd ser., ix. 1057; *Clements v. Macaulay*, 1866, Ct. Sess. Rep., 3rd ser., iv. 583.

⁴ See *Westlake*, p. 259, and compare Exception 1, p. 558, *ante*. As regards England, a contract falling under Exception 3 must usually fall under Exception 1.

⁵ *Jacobs v. Crédi Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589, suggests the conclusion that an English contract to be performed in France, the performance whereof is at the time when the contract is made lawful by French law, may be valid in England, even though at the time for the fulfilment of the contract the performance thereof is forbidden by French law. This inference is suggested by the head-note to the report of *Jacobs v. Crédi Lyonnais*, and by some expressions in the case, but is, it is submitted, erroneous. *Jacobs v. Crédi Lyonnais* only decides that a person who enters into an English contract, *i. e.*, a contract governed by the law of England, is not excused for its non-performance in France

Exception 3, however, does not, it would appear, apply to contracts which directly or indirectly violate the revenue laws of countries, such as France or Italy, which do not form part of the British dominions. There is certainly authority for the doctrine that the law of England does not pay any regard to the mere revenue laws of a strictly foreign state.¹ The English decisions, however, which support this doctrine are mostly not of a recent date, and its validity may be open to question. It can apparently have no application to the revenue laws of any country, such as Victoria, which forms part of the British dominions.

Illustrations.

1. *X* contracts with *A* to smuggle goods into England. *X* and *A* are French citizens. The contract is made in France. It is invalid.²

2. *A* and *B* are partners, of whom *A* lives in Guernsey. *A* on behalf of the firm sells goods to *X* in Guernsey. The goods are delivered by *A* to *X*, and are packed by *A* in a particular way for smuggling into England. *B*, who lives in England, knows nothing of the sale. The contract is invalid.³

3. In 1796 *X* gives a bond to *A* for the price of goods agreed to be sold and delivered in London by *A* to *X*, and to be by *X* shipped to Ostend and thence reshipped for India, there to be trafficked with, contrary to the Statute 7 Geo. I. cap. 21, then in force. The bond is invalid.⁴

4. *X* and *A* make in France a contract relating to litigation in England. The contract is, under English law, bad on the ground of champerty. The contract is invalid.⁵

5. *X* contracts in England with *A* to smuggle goods into Victoria. The contract is invalid.

7. *X* contracts in England with *A* to set up a lottery in a foreign country, where the maintenance of a lottery is unlawful. The contract is invalid.

by circumstances which take place after the contract is made, and afford a legal excuse for non-performance under French, though not under English, law.

¹ See p. 561, note 3, *ante*.

² *I. e.*, in England. *Biggs v. Lawrence*, 1789, 3 T. R. 454; *Clugas v. Penahuna*, 1791, 4 T. R. 466.

³ *Ibid.*

⁴ *Lightfoot v. Tenant*, 1796, 1 B. & P. 552. But contrast *Pellecat v. Angell*, 1835, 2 C. M. & R. 311.

⁵ *Grell v. Levy*, 1864, 16 C. B. N. S. 73.

8. *X* contracts with *A* in England to smuggle goods into France. The contract (*semble*) is valid, and an action for the breach thereof can be maintained in England.¹

(C) *THE INTERPRETATION AND OBLIGATION OF CONTRACT.*

RULE 149.²— The interpretation of a contract and the rights and obligations under it of the parties thereto are to be determined in accordance with the proper law of the contract.³

Comment.

The laws of different countries differ as to the incidents which they attach to a given contract. The real effect, therefore, of a contract, *i. e.*, what is the true meaning thereof, and what are the rights or obligations of the parties thereto, cannot be determined until we have answered the question, what is the law by reference to which the contract is to be interpreted, explained, or construed?

¹ See note 3, p. 561, *ante*.

² See Intro., General Principle No. VI., p. 57, *ante*; Foote, pp. 375-422, 447-458; Story, ss. 263-322; Westlake, pp. 252-258; Savigny, ss. 369-374 (*Guthrie's transl.*, 2nd ed.), pp. 194-252.

Among these authorities, Foote should specially be consulted for the examination of recent English decisions, and Savigny for the elucidation of the general principle that the proper law for determining the incidents of the contract depends upon the intention of the parties. It may be noted that Savigny's views do not at bottom greatly differ from those of Story. Both entirely agree in the principle that the test by which to determine the proper law of a contract is the presumed intention of the parties, and this principle has been now fully adopted by our Courts. *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115; *Chamberlain v. Napier*, 1880, 15 Ch. D. 614; *The Gaetano*, 1882, 7 P. D. (C. A.) 137; *Chartered Bank of India v. Netherlands Co.* 1882, 9 Q. B. D. 118; 1883, 10 Q. B. D. (C. A.) 521; *Jacobs v. Cr  dit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589; *In re Missouri Steamship Co.* 1889, 42 Ch. D. (C. A.) 321; *The August*, [1891] P. 328, 340. Compare *Chatenay v. Brazilian &c. Telegraph Co.* [1891] 1 Q. B. (C. A.) 79. See *Gibbs v. Soci  t   Industrielle &c.* 1890, 25 Q. B. D. (C. A.) 399, especially, pp. 405-407, judgment of Esher, M. R.; *Hamlyn v. Talisker Distillery*, [1894] A. C. 202. Both in reality determine the intention of the parties mainly by reference to the law of the country where it is to be performed (*lex loci solutionis*). See especially, Story, s. 280. The difference between them is that, where there is no other ground for determining what is the proper law of a contract, Savigny prefers the *lex domicilii* of the debtor, whilst Story, following the English decisions, prefers the *lex loci celebrationis*, or law of the country where the contract is made. See App., Note 2, *Preference of English Courts for lex loci contractus*.

³ As to meaning of "proper law of a contract," see Rule 143, p. 540, *ante*.

The one general principle which the law of England supplies for the answer to this inquiry is, "that the rights of the parties to a contract are to be judged of by that law by which they intended [to bind], or rather by which they may justly be presumed to have bound themselves."¹ "You must have regard to the law of the contract, by which I mean the law which the contract itself imports is to be the law governing the contract;"² in other words, the meaning and effect of every contract depends upon the law by which the parties intended it to be governed, *i. e.*, upon its "proper law."

This general principle applies both to the *interpretation* or explanation of a contract and to the *obligation* of a contract, *i. e.*, the rights and obligations of the parties under it.

Interpretation. — That a contract must be explained in accordance with its proper law, in so far as its meaning depends upon technical legal terms or upon rules of law, is almost self-evident.³ The aim of a Court, when called upon to interpret a contract, must be to give to it the sense which was affixed to the contract by the parties when entering into it. But if the law to which the contracting parties looked (*i. e.*, the proper law of the contract) be disregarded, a sense may be given to the terms of their agreement totally different from the sense which they were intended to bear. Thus, if *H* and *W* execute in England a marriage settlement, meant to be carried out in Scotland and to be governed by Scotch law, the very meaning of the terms used, no less than the general effect of the contract, will be misunderstood unless the Court called upon to construe the settlement has regard to the law of Scotland.⁴

Obligation. — The rights, again, and obligations under a contract, of the parties thereto, no less than the meaning of the terms employed therein, must be determined with reference to the law which the parties had in view when they came to an agreement,

¹ *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115, 123, per *Willes*, J. Compare *Chamberlain v. Napier*, 1880, 15 Ch. D. 614, 630, judgment of *Hall*, V. C.; *Chartered Bank of India v. Netherlands Co.* 1883, 10 Q. B. D. (C. A.) 521, 540, judgment of *Lindley*, L. J.; *The Gaetano*, 1882, 7 P. D. (C. A.) 137, 146, judgment of *Brett*, L. J.; *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589, 601, per *Curiam*; *In re Missouri Steamship Co.* 1889, 42 Ch. D. (C. A.) 321, 340, judgment of *Fry*, L. J.; *The August*, [1891] P. 328, 340, judgment of *Sir J. Hannen*.

² *In re Missouri Steamship Co.* 1889, 42 Ch. D. (C. A.) 321, 336, per *Halsbury*, Ch.

³ See Intro., pp. 57–59, *ante*.

⁴ See *Chamberlain v. Napier*, 1880, 15 Ch. D. 614.

i. e., the proper law of the contract. For if a contract made with a view to the law of one country be construed in accordance with the law of some other country, it is all but certain that the end of the contract will not be attained, but that one or each of the parties will acquire rights or incur liabilities different from those which the agreement was intended to confer or impose.¹

Rule 149, and the grounds on which it rests, are not hard to understand. The true difficulty lies in answering a question to which, when applied to a given case, the Rule immediately gives rise : On what principles are we to determine what was the intention of the parties to a contract in reference to the law by which it should be governed ? The answer to this question may often be hard to find, and this for two reasons. Under the complicated transactions of modern life, a contract which contains a foreign element may be so connected with different countries as to suggest not only two, but as many as five or six, different laws as the law by which the parties intended a contract to be governed, or, in other words, as the proper law of the contract. Suppose, for example, that *A*, an Englishman, charters a French ship from *X*, its French owner, at a Danish port in the West Indies, for the carriage of the goods of *A* from Hayti to Genoa, and that the ship, under stress of weather, puts into a Portuguese port, where transactions take place which result in a loss to *A*, and that *A* claims damages from *X*, alleged to be due under the contract between them. In this position of things, which is suggested by a reported case, there are six countries the law of any one of which may, conceivably at any rate, have been intended by the parties to govern the contract, at least in so far as to determine the question at issue between *A* and *X*. The Court, therefore, when called upon to decide what are *A*'s rights, has before it six different laws from which to select the law on which his rights depend. The intention of the parties, again, as to the law by which a contract is governed, is not generally expressed in the contract itself. What is more, it has often no real existence. If we could look into their minds, we should find that they had formed no definite purpose as to the law which should govern their rights under circumstances of which they did not anticipate the occurrence. Here, as in other branches of law, an inquiry into the intention of the parties is really an inquiry, not into the actual intention of *X* and *A*, for it possibly never had any real existence, but into

¹ Rule 149 is nothing else than the most obvious application of General Principle No. VI. (Intro., p. 57, *ante*), which itself is an immediate result of General Principle No. I. (Intro., p. 22, *ante*).

the intention which would have been formed by sensible persons in the position of *X* and *A* if their attention had been directed to contingencies which escaped their notice. When this is the case, the law which will be applied by any tribunal to the interpretation of a contract "is that which will most frequently and "most naturally be assumed by ignorant parties to a contract as "that by which their [rights and] liabilities are defined."¹ We are then driven back upon the further question, how are we to determine what is this natural assumption? The reply is, that a variety of circumstances must be considered, such as the nature of the contract, the customs of business, the place where the contract is made or is to be performed, and the like, any one of which may suggest conclusions as to the law likely to be intended by the parties; and English judges have constantly declined to tie themselves down by any rigid or narrow rule for determining the intention of the parties, or, in effect, the proper law of the contract.

The conclusions, however, at which the Courts have arrived in particular cases, though based on the circumstances of each case, are not the result of mere guesswork. They lead to, and in turn are the result of, certain maxims by which English Courts are, it is submitted, in the main guided when called upon to determine the proper law of a given contract.

These maxims are formulated in Sub-Rules 1 to 3.

The true nature of these Sub-Rules, if they are to be of any utility whatever, must be carefully borne in mind. They are in no sense rigid canons of construction from which a Court will not deviate. They are rather presumptive rules of evidence which are in fact frequently followed by English judges, but which are not in any degree irrebuttable, and are liable to be displaced by circumstances of any kind which in a given case influence the opinion of the Court.²

Two further observations are worth notice:—

In particular classes of contracts³ custom has established⁴ certain definite rules as to the presumed intention of the parties. Where such established rules exist, recurrence to general presumptions is usually unnecessary, and our Sub-Rules are for the most part superfluous. But this does not invariably hold good, for the presumption established by custom may be rebutted, *e. g.*, by

¹ *Foote*, 2nd ed., p. 377.

² See especially, *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589, 601, judgment of *Bowen*, L. J.

³ For such contracts, see chap. xxv., p. 586, *post*.

⁴ See *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115.

the expressed intention of the parties or by the circumstances of the case.¹

In certain rare instances, rules as to the intention of the parties are in effect established by statute.² Such statutory enactment, in so far as it applies, is decisive.

Sub-Rules for determining the Proper Law of a Contract in Accordance with the Intention of the Parties.

SUB-RULE 1.³ — When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract and, in general, overrides every presumption.

Comment.

As the proper law of a contract is fixed by the intention of the parties, their expressed intention with regard to it must (in general) be decisive.⁴

Illustrations.

1. X, an English underwriter, executes in England a policy of insurance of which it is one of the express terms that it shall be construed and applied in accordance with French law. The law of France is the proper law of the contract.⁵

¹ Compare particularly, *Chartered Mercantile Bank of India v. Netherlands &c. Co.* 1883, 10 Q. B. D. (C. A.) 521, 540, judgment of Lindley, L. J.

² See Bills of Exchange Act, 1882, s. 72, and Rules 159-162, pp. 599-612, *post*.

³ *Hamlyn v. Talisker Distillery*, [1894] A. C. 202. Compare *Savigny*, ss. 369, 370 (*Guthrie's transl.*, 2nd ed.), pp. 194, 197, and s. 372, p. 221, especially note A, p. 227.

⁴ Not quite invariably. Parties whilst really contracting with reference to one law, *e. g.*, the law of England, may conceivably, with a view to give validity to a contract which English law treats as invalid, assert their intention to contract with reference to another law, *e. g.*, the law of Scotland. The Courts must in this case determine the essential validity of the contract with reference to the law under which the parties really intended to contract, *i. e.*, the law of England. See App., Note 12, *What is the Law determining the Essential Validity of a Contract?*

⁵ See *Greer v. Poole*, 1880, 5 Q. B. D. 272. "It is no doubt competent to an underwriter on an English policy to stipulate, if he think fit, that such policy shall be construed and applied in whole or in part according to the law of any foreign state, as if it had been made in and by a subject of the foreign state, and the policy in question does so stipulate as regards general average ;

2. *X* and *A* enter into a contract in London which is to be performed, except as to the arbitration clause, in Scotland. It is an express term of the contract that any dispute arising out of it "shall be settled by arbitration by two members of the London Corn Exchange in the usual way." As to this arbitration clause the law of England is the proper law of the contract.¹

SUB-RULE 2.—When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.²

Illustrations.

1. *A*, an Englishman, ships a cargo on board the ship of *X & Co.*, a Dutch company registered under Dutch law. The company, however, consists of the same persons as an English company registered under English law. The goods are shipped at Singapore, for this purpose an English port, under a bill of lading in the English form and expressed in English. The cargo is damaged in a collision between the ship on which it is carried and another ship of *X & Co.* The proper law of the contract (bill of lading) is the law of England,³ and the presumption which would otherwise exist, that the parties submitted themselves to Dutch law as the law of the flag, is rebutted.⁴

2. An Englishman domiciled in England marries in Scotland

"but, except when it is so stipulated, the policy must be construed according to our law, and without regard to the nationality of the vessel." *Ibid.*, p. 274, *per Curiam*.

¹ *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

² "In such a case the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties." See *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589, 601, judgment of Bowen, L. J.

³ *Chartered Mercantile Bank of India v. Netherlands Co.* 1883, 10 Q. B. D. (C. A.) 521.

⁴ *Ibid.*, especially pp. 529, 530, judgment of Brett, L. J., and p. 540, judgment of Lindley, L. J., with which contrast *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115; *The August*, [1891] P. 328; and as to this presumption, and the meaning of the term "law of the flag," see *Contract of Affreightment*, Rules 153, 154, pp. 589, 590, *post*.

a Scotchwoman domiciled in Scotland. Before their marriage they have executed in Scotland a marriage contract (settlement) in the Scotch form. It is part of this contract that, on the death of the husband, his heirs, etc., shall pay to his wife, in case she should survive him, an annuity of £200, and further pay after his death to the children (if any) of the marriage the sum of £3,000. The husband and wife live after the marriage in England. The law of Scotland is the proper law of the contract, and, when on the death of the husband his estate is found not to be enough to satisfy both the annuity payable to the wife and the sum of £3,000 payable to the children, the rights of the wife and the children respectively are governed by the law of Scotland.¹

3. An Englishman, domiciled in England, marries a Scotchwoman domiciled in Scotland. A marriage settlement is, before the marriage, executed in Scotland by the intended husband and wife. In the settlement, trusts are declared in the English form of the husband's real estate in England. The proper law of the contract as regards such trusts is the law of England.²

4. *X & Co.*, a London firm, contract in London to sell to *A & B*, also a London firm, 20,000 tons of esparto, to be shipped by a French company at an Algerian port, on board vessels to be provided by *A & B*, who are to pay for the esparto in London in cash on or before the arrival of the ships at the port of destination. English law is the proper law of the contract.³

SUB-RULE 3. — In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect: —

*First Presumption.*⁴ — *Primâ facie* the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may

¹ *In re Barnard*, 1887, 56 L. T. 9; W. N. 1887, p. 8.

² *Chamberlain v. Napier*, 1880, 15 Ch. D. 614. See as to the "proper law of a contract" with regard to immovables, chap. xxv., Rule 151, p. 586, *post*.

³ *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589.

This case might also be brought under Sub-Rule 3, 1st presumption. See *Contracts with regard to Movables*, Rule 152, p. 588, *post*.

⁴ Compare *Story*, ss. 242, 280; *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115; *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589, especially p. 600, judgment of Bowen, L. J.; *P. & O. Co. v. Shand*, 1865, 3 Moore P. C. N. s. 272; *Scott v. Pilkington*, 1862, 2 B. & S. 11; 31 L. J. Q. B. 81.

be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country.

*Second Presumption.*¹—When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*).

Comment.

Both these presumptions are grounded on the probable intention² of the parties.

As to the first presumption. “The broad rule is, that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties.”³

“One inference which has always been adopted is this: if a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that that contract, as to its construction and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made.”⁴

“It is . . . generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended [to adopt], or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention.”⁵

These dicta lay down the undoubted rule of English law, that the meaning of a contract and the obligations arising under it are *primâ facie* and presumably governed by the law of the country where the contract is made (*lex loci contractus*). The language

¹ See note 4, p. 569, *ante*.

² See pp. 565–567, *ante*.

³ *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589, 600, per Bowen, L. J. See *Story*, s. 242.

⁴ *Chatenay v. Brazilian Submarine Tele. Co.* [1891] 1 Q. B. (C. A.) 79, 82, judgment of *Esher*, M. R. Compare *Gibbs v. Société Industrielle &c.* 1890, 25 Q. B. D. (C. A.) 399, 405, judgment of *Esher*, M. R., cited p. 452, *ante*.

⁵ *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115, 122, per *Curiam*.

indeed of judges and writers of authority has sometimes produced the impression that something like exclusive authority is attributed by our Courts to the law of the country where the contract is completed. But this idea is erroneous. In many instances, as is apparent from our second presumption, the meaning and incidents of a contract are governed by the law of the place of performance.

The distinct and still strong preference, however, of English Courts for the *lex loci contractus*¹ must never be forgotten. This preference leads to the result that in all cases of doubt, and especially where a contract is made in England, our Courts hold that the proper law of the contract is the law of the country where the contract is made.

As to the second presumption. The assumption, which in many cases is sound, that the proper law of a contract is the law of the country where it is made (*lex loci contractus*), presupposes in general that "the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance."²

"The business sense of all business men," says Lord Esher, "has come to this conclusion, that, if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. . . . Therefore the law has said, that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country."³

"When two parties," says Lord Watson, "living under differ-

¹ See App., Note 2, *Preference of English Courts for lex loci contractus*.

² *Story*, s. 280. Compare *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589, 600, language of Bowen, L. J.

³ *Chalenay v. Brazilian Submarine Tele. Co.* [1891] 1 Q. B. (C. A.) 79, 82, 83, judgment of Lord Esher, M. R.

"ent systems of law, enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract, or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract, and the course of performing its stipulations contemplated by the parties; and amongst these considerations the *locus contractus* and the *locus solutionis* have always been regarded as of importance, although English and Scotch decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one forum and the place of performance in another."¹

The effect of these dicta may be thus summed up: the proper law of a contract is indeed *prima facie* the law of the country where it is made (*lex loci contractus*); yet when a contract is made in one country, but is wholly or partially to be performed in another, then great weight will be given to the law of the place of performance (*lex loci solutionis*), as being probably the proper law of the contract, in regard at any rate to acts to be done there.

Our second presumption covers at least two different cases:—

First case. A contract is made in one country and is to be wholly performed in another, as where *X* and *A* enter into an agreement in Scotland, *e. g.*, for the sale of goods by *X* to *A*, and the whole of the contract is to be performed on both sides in England. The law of England (*lex loci solutionis*) is, then, presumably the proper law of the contract as a whole, and certainly governs every incident having reference to the mode of performance, *e. g.*, the delivery of and the payment for the goods.²

Second case. A contract is made in one country, and is to be performed, as regards the obligations of one of the parties, wholly in that country, and as regards the obligations of the other wholly in another country, as where *A* agrees to deliver goods to *X* in Liverpool, and *X* agrees to pay for them in New York. The contract may be treated as two contracts,³ the one to be performed

¹ *Hamlyn v. Talisker Distillery*, [1894] A. C. 202, 212, per Lord Watson. Compare *Savigny*, s. 372, p. 222.

² Whether the law of Scotland may not determine what are the legal excuses for non-performance?

³ Many difficulties as to the proper law of a contract are removed by noticing that what is called "a contract" is often in effect a set of two or more contracts, and the proper law of these several contracts may be different. This is specially noticeable in regard to the different contracts which may be embodied in a single bill of exchange. See chap. xxv., Rule 160 (2), p. 605, *post*.

by *A* in England and the other by *X* in New York. It is, then, reasonable at any rate to assume (though the presumption is by no means conclusive) that on the one hand the delivery, etc., of the goods (*i. e.*, the performance of *A*'s share of the contract) is governed by the law of England, and on the other hand the payment for the goods, *i. e.*, the performance of *X*'s part of the contract, is governed by the law of New York.¹

Illustrations.

Presumption 1.

1. *X*, a Frenchman domiciled in France, incurs in London a debt to *A* for goods there sold by *A* to *X*. English law (*lex loci contractus*) is the proper law of the contract.

2. A note is made and is payable in England. English law (*lex loci contractus*) is the proper law of the contract.²

3. *X*, an Englishman carrying on business in England, while in New York gives *N*, of New York, a letter of credit to the following effect: "You have authority to draw exchanges upon me, and all such exchanges will be duly honored." This letter is shown to *A*, who, on the faith thereof, purchases a bill drawn by *N* on *X*. *X* does not accept the same. *X* is not liable to *A* by the law of England for not accepting the bill, but he is liable by the law of New York. The law of New York (*lex loci contractus*) is the proper law of the contract.³

4. *A*, an Englishman, contracts in England with *X & Co.*, an English company, for the carriage by them of goods from Eng-

¹ As to the somewhat different case of "contracts for through carriage," see chap. xxv., Rule 155, p. 594, *post*.

² See *Kearney v. King*, 1819, 2 B. & Ald. 301; *Sproule v. Legge*, 1822, 1 B. & C. 16. In this as in many other cases the *lex loci contractus* is also the *lex loci solutionis*.

³ "It [is] contended, on the part of the defendants [*X*], that as the thing 'contracted for, namely, the acceptance of the bills, was to be performed in 'this country, the law of England, as that of the place of performance, ought 'to prevail. We are of a contrary opinion, it appearing to us that the question of the defendant's liability must be determined by the *lex loci contractus*. 'The question at issue has no relation to the manner of performing the contract, or to the consequences of non-performance. It relates entirely to the 'effect of the transaction at New York, and the document signed there by one 'of the defendants on behalf of the rest (his authority to bind the partnership 'not being called in question) in creating a liability in the defendants to the 'purchasers of the bills, which by the document the defendants were bound to 'accept in favour of [*N*]." *Scott v. Pilkington*, 1862, 31 L. J. Q. B. 81, 90, per Cockburn, C. J. See 2 B. & S. 11, 43, 44.

land to Mauritius on a British ship. *A* takes a ticket at Southampton which contains a condition limiting the liability of the company. *A*'s goods are lost in Egypt. The condition, according to English law, covers the liability of *X & Co.* According to the law of Mauritius (French law), it does not cover their liability. English law (*lex loci contractus*) is the proper law of the contract.¹

5. *X*, an Englishman, makes a contract in London with *A*, a Scotchman, under which *A* is to act as traveller for *X* in Scotland. Semble, English law is the proper law of the contract (?).²

Presumption 2.

6. *X* contracts a debt to *A* in Jamaica which is made payable in London. English law (*lex loci solutionis*) is, at any rate as regards payment, the proper law of the contract.³

7. In 1870 a bill of exchange is drawn by *X* in England on *N & Co.*, French subjects resident in Paris, and is indorsed in England by *X* to *A*. The bill is accepted by *N & Co.* in Paris, and is on the face of it payable on 5th October, 1870. In consequence of the Franco-German war, the time for payment is under French law enlarged till 5th September, 1871. French law is the proper law of the contract, and the bill, as against all the parties thereto, is payable on 5th September, 1871.⁴

8. *X* in England charters *A*'s ship for carriage of coals to Algiers. It is part of the terms of the charter party that the ship shall be unloaded at a certain rate *per diem*, and that *X* shall pay £5 *per diem* for detention from the time of the ship being ready to unload and "in turn to deliver." Delivery is delayed by the French port regulations. In reference to delivery the proper law of the contract is the French law as to unloading at the port (*lex loci solutionis*).⁵

9. *X*, an Englishman, under a charter party made between him and *A*, a foreigner, at Riga, loads *A*'s ship with a cargo of timber to be delivered in the port of Liverpool. A given number of lay days are allowed for the unloading. By the general law, the lay

¹ *P. & O. Co. v. Shand*, 1865, 3 Moore P. C. N. s. 272. Compare *Nugent v. Smith*, 1875, 1 C. P. D. 19; and 1876 (C. A.) 423. See as to Contract for Through Carriage of Person or Goods, Rule 155, p. 594, *post*.

² *Arnott v. Redfern*, 1825, 2 C. & P. 88.

³ Compare *Cash v. Kennion*, 1805, 11 Ves. 314.

⁴ *Rouquette v. Overmann*, 1875, L. R. 10 Q. B. 525. See as to Bills of Exchange, Rules 159-161, pp. 599-610, *post*.

⁵ *Robertson v. Jackson*, 1845, 2 C. B. 412; 15 L. J. C. P. 28.

days commence from the time when the ship arrives in dock; but by the custom of the port of Liverpool the lay days, in case of the timber ship, begin only from the mooring of the ship at the quay, where alone by dock regulations the ship can discharge cargo. The commencement of the lay days is governed by the custom of the port of Liverpool (*lex loci solutionis*)¹ as the proper law of the contract.

(D) DISCHARGE OF A CONTRACT.

RULE 150.²— The validity of the discharge of a contract (otherwise than by bankruptcy)³ depends upon the proper law⁴ of the contract⁵ (?).

- (1) A discharge in accordance with the proper law of the contract is valid.
- (2) A discharge not in accordance with the proper law of the contract is not valid (?).

Comment.

On principle, the validity or invalidity of the discharge of a contract ought to depend upon the proper law of the contract, *i. e.*, upon the law to which the parties, when contracting, intended to submit themselves. If, for example, *X* and *A*, French citizens, enter into a contract in France to be performed in France, and which therefore is clearly subject to French law, the question whether an act on the part of *X*, *e. g.*, some act which *X* alleges amounts to payment, does or does not discharge *X* from liability, must (it is conceived) be determined by reference to French law, and this appears to be the view maintained by English Courts

¹ *Norden Steam Co. v. Dempsey*, 1876, 1 C. P. D. 654. Conf. *Atwood v. Sellar*, 1880, 5 Q. B. D. (C. A.) 286.

² *Story*, ss. 330-334, 342, with which read s. 280; *Nelson*, pp. 278, 279; *Foot*, pp. 458, 459, 465-467.

In order to understand *Story's* view, it must be noted that his habit is to speak of a contract as governed by the law of the place where it is made, but that he often means by this the law of the place where it is made and is to be, or may be, performed.

³ As to Discharge under a Bankruptcy, see chap. xvii., Rules 111-114, pp. 448-454, *ante*.

⁴ For meaning of "proper law," see p. 540, *ante*.

⁵ *Warrender v. Warrender*, 1834, 9 Bli. 89, 125, language of *Brougham*, Ch.; *Ralli v. Dennistoun*, 1851, 6 Ex. 483; 20 L. J. Ex. 278; *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 234.

and by writers such as Story. There is, however, a lack of decisive authority on the subject.

All that can be absolutely laid down is, that, when a contract is made and to be performed in the same country, anything which discharges the liability under the law of that country will be held a good discharge by our Courts. "The general rule is, that a defence or discharge, good by the law of the place where the contract is made or is to be performed, is to be held of equal validity in every other place where the question may come to be litigated."¹ So in a particular case it is laid down that, "inasmuch as it appeared that the accord and satisfaction was sufficient according to the law of the country where the bill was negotiated and the payment was made, the bill being then due and payable and in the hands of the true holder, the defence [of accord and satisfaction according to that law] was good;"² and more generally it has been said: "There is no doubt that a debt or liability in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability and does not merely interfere with the remedies or course of procedure³ to enforce it, will be an effectual answer to the claim, not only in the Courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries."⁴

On the whole, therefore, we may fairly conclude "that a contractual obligation, which has been extinguished by the law of that country which properly and substantially governs the obligation of the contract, cannot be enforced here,"⁵ and that a contractual obligation which has not been so extinguished can be enforced in England.

Illustrations.

1. *X*, a Frenchman, incurs in France a debt to *A*, also a Frenchman. *X* is under French law absolutely discharged from all liability to *A*, *e. g.*, by a statute which after the lapse of a given time extinguishes not only the remedy for the recovery of

¹ *Story*, s. 331.

² *Ralli v. Dennistoun*, 1851, 6 Ex. 483, 493, per *Parkes*, B. Compare *Rouquette v. Overmann*, 1875, L. R. 10 Q. B. 525.

³ Anything of this nature depends wholly on the *lex fori*. See chap. xxxi., Rule 188, p. 711, *post*.

⁴ *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 228, 234, judgment of *Bovill*, C. J. Compare *Gibbs v. Société Industrielle &c.* 1890, 25 Q. B. D. (C. A.) 399, 405, language of Lord *Esher*, cited pp. 452, 453, *ante*.

⁵ *Nelson*, p. 279.

the debt, but the debt itself. Semble, the discharge is valid in England.¹

2. *X* in Austria becomes liable to *A* on a bill of exchange drawn by *A* and accepted by *X* in Austria, and there payable. *X*, on the bill becoming due, owes *A* a sum equivalent to £100. He satisfies *A*'s claim by the payment of £90, which *A* accepts in satisfaction of the debt. This would not be an accord and satisfaction under English, but is an accord and satisfaction under Austrian law. The accord and satisfaction is a valid discharge of *X*'s debt to *A*.²

3. A bill for £100 is drawn and issued in Demerara, but is accepted and payable in England. At the time when the bill matures, the holder owes the acceptor £100. According to the law of Demerara, this operates as a discharge of the bill (by *compensatio*). The drawer is discharged in England.³

¹ Compare *Huber v. Steiner*, 1835, 2 Bing. N. C. 202.

² See *Ralli v. Dennistoun*, 1851, 6 Ex. 483, 493. Compare *Burrows v. Jemino*, 1726, 2 Strange, 733.

³ *Allen v. Kemble*, 1848, 6 Moore P. C. 314.

AMERICAN NOTES.

CHAPTER XXIV.

CONTRACTS.—GENERAL RULES.

1. (Rule 143.) **LAW GOVERNING CONTRACTS.** — A contract is governed by the law with a view to which it was made. *Wayman v. Southard*, 10 Wheat. 1, 84. "The law . . . which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting their obligation." *Pritchard v. Norton*, 106 U. S. 124. "The contract being made at New York, the shipowner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract." *Liverpool Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 458. In this case there was no express agreement as to the law by which the contract should be governed.

2. (Rule 144.) **POSITIVE RULE AS TO CONTRACTS.** — Sometimes the validity or invalidity of a contract, at the place where it is sought to be enforced, is determined by a positive rule of law, without regard to the law of the place where it was made. Thus, a statute may validate marriages performed abroad in a certain mode not authorised by the *lex loci celebrationis*. *Wharton, Conf. of L.* ss. 178, 179. Or a court may refuse to enforce a contract on grounds of policy or morality, as well as on statutory grounds. *Flagg v. Baldwin*, 38 N. J. Eq. 219; 48 Am. Rep. 308; *Lemonius v. Mayer* (Miss.), 14 So. 33; *White v. Eason* (Miss.), 15 So. 66; *Rowland v. Building & Loan Association* (N. C.), 18 S. E. 965; *The Guildhall*, 58 Fed. Rep. 796; *McDermott v. Prudential Ins. Co.* (Pa. Com. Pl.) 7 Kulp, 246. See *Ross v. Wigg*, 34 Hun (N. Y.), 192.

3. (Rule 145.) **QUESTIONS AS TO PROCEDURE.** — "A contract valid by the law of the place where it is made, although not in writing, will not be enforced in the Courts of a country where the Statute of Frauds prevails, unless it is put in writing. But where the law of the forum and that of the place of the execution of the contract coincide, it will be enforced, although required to be in writing by the law of the place of performance, as was the case of *Scudder v. Union National Bank*, 91 U. S. 406, because the form of the contract is regulated by the law of the place of its celebration, and the evidence of it by that of the forum." *Pritchard v. Norton*, 106 U. S. 124, 134. See *Story, Conf. of L.* s. 262. Where a statute by its terms affects, or where it is treated as affecting, the remedy, the *lex fori* governs. *Downer v. Cheseborough*, 36 Conn. 39; *Kleeman v. Collins*, 9 Bush (Ky.), 460; *Wilcox Co. v. Green*, 72 N. Y. 18; *De Costa v. Davis*, 24 N. J. L. 319. See *Suit v. Wood-*

hall, 113 Mass. 391. But where the statute by its terms affects, or where it is treated as affecting, the original validity of the contract in point of form, the *lex loci contractus* governs. *Miller v. Wilson*, 146 Ill. 523; 34 N. E. 1111; *Wolf v. Burke*, 18 Col. 264; 32 Pac. 427; *Exchange Bank v. Hubbard*, 62 Fed. Rep. 112; *Eldridge v. Heaton*, 7 Ohio Cir. Ct. 499; *Cochran v. Ward*, 5 Ind. App. 89; 29 N. E. 795. An oral contract, lawful where it was made, may be enforced there, though it is for the delivery of goods in a State whose Statute of Frauds requires such contracts to be in writing. *Hunt v. Jones*, 12 R. I. 265.

4. (Rule 146.) CAPACITY TO CONTRACT. — "As a general rule, . . . the "law of the domicile governs the status of a person." *Lamar v. Micou*, 112 U. S. 452. "The civil status is governed universally by one single principle — namely, that of domicile — which is the criterion established by law for "the purpose of determining the civil status, for it is on this basis that the "personal rights of a party — that is to say, the law which determines his "majority or minority, his marriage, succession, testacy, or intestacy — must "depend." *Woodward v. Woodward*, 87 Tenn. 644; 11 S. W. 892; *Robinson v. Queen*, 87 Tenn. 445. This rule is, however, subject to exceptions, and it has been said that the general current of American authority is "in favour of hold- "ing that a contract which by the law of the place is recognised as lawfully "made by a capable person is valid everywhere, although the person would "not, under the law of his domicile, be deemed capable of making it." *Milliken v. Pratt*, 125 Mass. 374. In this case a married woman domiciled in Massachusetts was held liable on a contract of surety for her husband, made in Maine, where it was valid, though she would have been incapable of entering into such a contract in Massachusetts. The Court observed, however, that the laws of Massachusetts did not treat married women as wholly incapable of contracting, and that possibly the Courts of a State in which the common law prevailed in full force might, on grounds of public policy, hold a different view. Such proved to be the case in *Armstrong v. Best*, 112 N. C. 59; 17 S. E. 14, where, upon the ground of common-law disability, it was held that a married woman domiciled in North Carolina could not be sued there for the price of goods purchased in Baltimore, Maryland. But in a prior case it was held that a married woman domiciled in North Carolina might be sued on a contract made in another State before she acquired her domicile in North Carolina. *Taylor v. Sharp*, 108 N. C. 377. It has frequently been held that the contract of a married woman made in the State of her domicile will be governed by the law of such State. *Gibson v. Sublett*, 82 Ky. 596; *Spearman v. Ward*, 114 Pa. St. 634; *Insurance Co. v. Simons*, 52 Mo. App. 357; *Miller v. Campbell*, 140 N. Y. 457; 35 N. E. 651; *Voigt v. Brown*, 42 Hun, 394; *Bradley v. Johnson*, 46 N. J. L. 271. But where the contract is made in a State other than that of the domicile, the question of capacity may be determined by the *lex loci contractus*. *Graham v. Norfolk Bank*, 84 N. Y. 393; 38 Am. Rep. 528; *Bell v. Packard*, 69 Me. 105. See *Evans v. Cleary*, 125 Pa. St. 204, cited in *Baum v. Birchall*, 150 Pa. St. 164; 24 Atl. 620; 30 W. N. C. 343. See also, *Case v. Dodge* (R. I.), 29 Atl. 785. A married woman who accepts a trust in the State of her domicile may be required to execute it there, even after she has changed her domicile to another State in which a married woman cannot be appointed as trustee. *Schluter v. Bowers Savings Bank*, 117 N. Y. 125.

The capacity of a person to contract in respect of real estate is governed by

the *lex rei sitæ*. *Cochran v. Benton*, 126 Ind. 58; *Frierson v. Williams*, 57 Miss. 451; *Johnson v. Gawtry*, 11 Mo. App. 322; *Merrielles v. Bank*, 5 Tex. Civ. App. 483; 24 S. W. 564.

5. (Rule 147.) FORMAL VALIDITY OF CONTRACTS. — "Obligations in respect to the mode of their solemnization are subject to the rule *locus regit actum*." *Pritchard v. Norton*, 106 U. S. 124, 130; *Scudder v. Union National Bank*, 91 U. S. 406; *Miller v. Wilson*, 146 Ill. 523; 34 N. E. 1111; *Exchange Bank v. Hubbard*, 62 Fed. Rep. 112. This rule, however, is not universally applicable. *Forbes v. Scannell*, 13 Cal. 241. The formal validity of a promise to accept and pay a bill of exchange may be determinable, not by the law of the place where the promise was made, but by the law of the place where it was to be performed, the latter being the law which the parties had in view. *Hall v. Cordell*, 142 U. S. 116; 12 Sup. Ct. 154.

The failure to comply with local requirements as to form, not affecting the obligation of the agreement, will not invalidate the contract. *Wharton, Conf. of L. ss.* 685-688.

The formal validity of a contract relating to land depends upon the *lex situs*. *Post v. First Nat. Bank of Springfield*, 138 Ill. 559; *Prentice v. Duluth Storage and Forwarding Co.* 58 Fed. Rep. 437; 7 C. C. A. 293. Sometimes the *lex situs*, by special enactment, accepts compliance with the *lex loci contractus* as sufficient. *Stinson v. Geer*, 42 Kan. 520.

As to the solemnization of marriages, see American Notes under chap. xxvi.

6. (Rule 148.) ESSENTIAL VALIDITY OF CONTRACTS. — The essential validity of a contract is governed by the law with a view to which the contract was made, and this, in matters of performance, is the law of the place of performance. *Pritchard v. Norton*, 106 U. S. 124, 137; *Scudder v. Union National Bank*, 91 U. S. 406; *Trust Co. v. Rathbun*, 5 Sawyer C. C. 32; *Akers v. Demond*, 103 Mass. 323; *Baum v. Birchall*, 150 Pa. St. 164; 24 Atl. 620; 30 W. N. C. 343; *Forepaugh v. Railroad Co.* 128 Pa. St. 217; *Fowler's Appeal*, 125 Pa. St. 388; 17 Atl. 431; *Watson v. Lane*, 52 N. J. L. 550; 20 Atl. 894; *Hartman v. Louisville & N. Ry. Co.* 39 Mo. App. 88; *Dunn v. Welsh*, 62 Ga. 241. This rule applies to the question of want of consideration. *Pritchard v. Norton*, 106 U. S. 124; *Sturdivant v. Bank*, 60 Fed. Rep. 730; 9 C. C. A. 256. The language of the cases often fails to distinguish between formal validity and essential validity, or between the making and the performance of the contract; and not infrequently it is held, in respect of matters of essential validity, that the validity of a contract is to be determined by the law of the place where the contract is made. *Baxter National Bank v. Talbot*, 154 Mass. 213; 28 N. E. 163; *In re Kahn*, 55 Minn. 509; 57 N. W. 154; *Lockman v. Block (La.)*, 17 So. 153. See *Milliken v. Pratt*, 125 Mass. 374; *Weinstein v. Freyer*, 93 Ala. 257; 8 So. 285; *Miller v. Wilson*, 146 Ill. 523; 34 N. E. 1111; *Joslin v. Miller*, 14 Neb. 91; *Atlantic Phosphate Co. v. Ely*, 82 Ga. 438; 9 S. E. 170; *Vimont v. Northwestern &c. Ry. Co.* 69 Iowa, 296; *Howenstein v. Barnes*, 5 Dillon C. C. 482; *Wharton, Conf. of L. s.* 410. The presumption, there being nothing to the contrary in the terms or the circumstances of the making of the contract, is that the contract is to be performed at the place where it is made. *Pritchard v. Norton*, 106 U. S. 124, 137.

"The general rule undoubtedly is that the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in

"another country ; but to this, as to all general rules, there are exceptions, and "among these *Story* mentions contracts made in a foreign country to promote "or reward the commission of crime, to corrupt or evade the due administration of justice, to cheat public agents, or to affect the public rights, and other "contracts which in their nature are founded in moral turpitude, and are inconsistent with the good order and solid interests of society." It was accordingly held that an agreement by which a Turkish consul, for a certain commission, was to recommend certain supplies to his government, would not be enforced in the United States, though it might be valid in Turkey. "A contract," said the Court, "to bribe or corruptly influence officers of a foreign government will not be enforced in the Courts of this country, — not from "any consideration of the interests of that government or any regard for its "policy, but from the inherent viciousness of the transaction, its repugnance "to our morality, and the pernicious effect which its enforcement by our Courts "would have upon our people." *Oscanyan v. Arms Co.* 103 U. S. 261. Courts will not enforce contracts that violate good morals, *Armstrong v. Toler*, 11 Wheat. 258 ; *Smith v. Godfrey*, 8 Fost. 379 ; *Eubanks v. Banks*, 34 Ga. 304 ; *Phinney v. Baldwin*, 16 Ill. 108 ; *Greenwood v. Curtis*, 6 Mass. 358 ; *Union &c. Co. v. R. R.* 37 N. J. L. 23 ; *Ivey v. Lalland*, 42 Miss. 444 ; or domestic policy, *Andrews v. Pond*, 13 Pet. 65 ; *Blanchard v. Russell*, 13 Mass. 1 ; *Bliss v. Brainard*, 41 N. H. 256 ; *Woodward v. Roane*, 23 Ark. 523 ; *Castleman v. Jeffries*, 60 Ala. 380 ; *Davis v. Bronson*, 6 Iowa, 410 ; *Insurance Co. v. Edmondson*, 5 La. An. 295 ; *Merchants' Bank v. Spalding*, 12 Barb. 302. Sunday laws are not treated as rules of positive morality, and a contract validly entered into on Sunday where it was made will be enforced elsewhere. *McKee v. Jones*, 67 Miss. 405 ; 7 So. 348 ; *Swann v. Swann*, 21 Fed. Rep. 299. A note given in payment for slaves, at a place where slavery is legal, will be sustained elsewhere. *Coon v. Aves*, 18 Pick. 193 ; *Roundtree v. Baker*, 52 Ill. 241. See *Osborn v. Nicholson*, 13 Wall. 654.

Contracts made with a view to violate the law at the place of performance are invalid. *Chambers v. Church*, 14 R. I. 398 ; 51 Am. Rep. 410 ; *Keiwert v. Meyer*, 62 Ind. 587. But a contract of sale, valid where made, is not invalidated by the fact that the purchaser intends to resell the article elsewhere in violation of law, though the vendor was aware of his unlawful purpose. *Parsons Oil Co. v. Boyett*, 44 Ark. 230 ; *Feineman v. Sachs*, 33 Kan. 62 ; 52 Am. Rep. 547 ; *Distilling Co. v. Nutt*, 34 Kan. 724 ; *Lauten v. Rowan*, 59 N. H. 215.

As to contracts with public enemies, see *Wharton, Conf. of L.*, 2nd ed., s. 497 ; *Coppell v. Hall*, 7 Wall. 542 ; *Hall v. Costello*, 48 N. H. 176 ; *Kennett v. Chambers*, 14 How. 38 ; *Baily v. Milner*, 35 Ga. 330. A partnership between citizens of two States is dissolved by the breaking out of war between such States. *Matthews v. McStea*, 91 U. S. 7 ; *Hubbard v. Matthews*, 54 N. Y. 43 ; *Taylor v. Hutchins*, 25 Gratt. 536.

The validity of a contract cannot be secured by apparently subjecting it to a law by which it is not properly governed. *Mortgage Co. v. Jefferson*, 69 Miss. 770 ; 12 So. 464 ; *Arbuckle v. Reaume*, 96 Mich. 243 ; 55 N. W. 808.

The question of champerty is governed by the laws of the State in which the contract is to be performed. *Richardson v. Rowland*, 40 Conn. 566 ; *Williams v. Dodge*, 28 N. Y. Supp. 729 ; 8 Misc. Rep. 317. *Contra, Blackwell v. Webster*, 23 Blatchf. 537 ; 29 Fed. Rep. 614.

An agreement to deal in futures is governed by the laws of the place where it is to be performed. *Harvey v. Merrill*, 150 Mass. 1 ; *Hubbard v. Sayre* (Ala.), 17 So. 17 ; *Ward v. Vosburgh*, 31 Fed. Rep. 12.

The validity of a contract relating to a lottery is governed by the law of the place of performance. *Paine v. France*, 26 Md. 46; *Hatch v. Hanson*, 46 Mo. App. 323; *Kentucky v. Bassford*, 6 Hill (N. Y.), 526; *Thatcher v. Morris*, 11 N. Y. 437; *Ormes v. Dauchy*, 82 N. Y. 443 (1880). But, by the Penal Code of New York (1881), any agreement made in that State to gamble in the legalised lotteries of another State is unlawful. *Goodrich v. Houghton*, 134 N. Y. 115; 31 N. E. 516. It is no objection to the legality of a sale of lottery tickets, valid in the State in which such sale was made, that the seller knew that the purchaser intended to resell them in violation of the laws of another State. *McIntyre v. Parks*, 3 Met. (Mass.) 207.

Usury laws are not usually considered as rules of positive morality. See "The Enforcement of Usurious Foreign Contracts," *Albany Law Journal*, September 25, 1886. Hence the question of usury is governed by the proper law of the contract. *Akers v. Demond*, 103 Mass. 323; *Dickinson v. Edwards*, 77 N. Y. 578; *Iron Co. v. Burkam*, 10 Mich. 283; *Bowman v. Miller*, 25 Gratt. 331; *Western Transp. & Coal Co. v. Kilderhouse*, 87 N. Y. 430. The decisions, however, as to what constitutes the proper law of the contract in this regard, are extremely conflicting. Wharton says that the general import of the adjudicated cases is that the question of interest (which may or may not involve the question of usury) is governed by the law of the place of performance, but that, as to what is the place of performance in this sense, opinions diverge. *Conf. of L.* ss. 504, 505; *Scotland County v. Hill*, 132 U. S. 107; 10 Sup. Ct. 26. It has been held that the question of usury is to be determined by the law of the place where the contract is made. *Thornton v. Dean*, 19 S. C. 583; 45 Am. Rep. 796; *Martin v. Johnson* (Ga.), 10 S. E. 1092; *Coad v. Home Cattle Co.* 32 Neb. 761; 49 N. W. 757; *Clark v. Seagrigh*, 19 Atl. 941; *Pancoast v. Travelers' Ins. Co.* 79 Ind. 172; *Peterborough Bank v. Childs*, 130 Mass. 519; 39 Am. Rep. 474; *Bowles v. Eddy*, 33 Ark. 645. But the law of the place where the agreement is made, rather than the place where the evidences of it are executed, governs the question of usury. *Mott v. Rowland*, 85 Mich. 561; 48 N. W. 638; *Scott v. Perlee*, 39 Ohio St. 63; 48 Am. Rep. 421; *Staples v. Nott*, 128 N. Y. 403; 28 N. E. 515; *Wayne County Savings Bank v. Low*, 81 N. Y. 566; 37 Am. Rep. 533; *Sheldon v. Haztun*, 91 N. Y. 124; *Western Transp. & Coal Co. v. Kilderhouse*, 87 N. Y. 430. The real nature of the transaction must be considered in order to determine by what law it is properly governed. *Cubbedge v. Napier*, 62 Ala. 518; *American Freehold Land Mortgage Co. v. Sewell*, 92 Ala. 163; *Falls v. Savings Co.* 97 Ala. 417; *Thompson v. Edwards*, 85 Ind. 414; *Rowland v. Building & Loan Asso.* (N. C.) 18 S. E. 965; *Jackson v. American Mortgage Co.* 88 Ga. 756; 15 S. E. 812; *Odum v. New England Mortgage Security Co.* 91 Ga. 505; 18 S. E. 131. Usury is determined by the law of the place where a note is made payable, *Bigelow v. Burnham*, 83 Iowa, 120; 49 N. W. 104; *Odum v. New England Mortgage Security Co.* 91 Ga. 505; 18 S. E. 131; *Sharp v. Davis*, 7 Baxter (Tenn.), 607; by the law of the place where the note is made and is payable, *Shoe & Leather Bank v. Wood*, 142 Mass. 563; or where it is payable and is delivered, *Buchanan v. Drivers' Nat. Bank*, 55 Fed. Rep. 223; 5 C. C. A. 83; 6 U. S. App. 566; or where it is executed, delivered, and made payable. *Merchants' Bank v. Southwick*, 67 How. (N. Y.) Pr. 324. Courts incline to sustain the validity of contracts made in good faith. *Brown v. American Finance Co.* 31 Fed. Rep. 516; *Fitch v. Remer*, 1 Flipp. C. C. 15. See *Flournoy v. Bank*, 79 Ga. 810. Thus parties acting in good faith may

stipulate for the rate of interest allowed either at the place of contract or at the place of performance. *Miller v. Tiffany*, 1 Wall. 298; *Scudder v. Union Nat. Bank*, 91 U. S. 106; *Sturdivant v. Memphis Nat. Bank*, 60 Fed. Rep. 730, 732; 9 C. C. A. 256; *Bigelow v. Burnham*, 83 Iowa, 120; 49 N. W. 104; *Smith v. Parsons* (Minn.), 57 N. W. 311; *Falls v. Savings Co.* 97 Ala. 417; 13 So. 25; *New England Co. v. McLaughlin*, 87 Ga. 1; 13 S. E. 81; *Dugau v. Lewis*, 79 Tex. 246; 14 S. W. 1024; *Watson v. Lane*, 52 N. J. L. 550; *Kellogg v. Miller*, 2 McCrary, 395. The choice of law in this regard is not, however, purely the subject of contract; and the designation of a certain law, merely as a cloak for usury, is invalid. *Mortgage Co. v. Jefferson*, 69 Miss. 770; 12 So. 464; *Kilcrease v. Johnson*, 85 Ga. 600; 11 S. E. 870. The fact that a loan is secured by a mortgage on land does not in itself subject the contract in respect of usury to the law of the State in which the land lies. *Central Trust Co. v. Burton*, 74 Wis. 329; 43 N. W. 141; *Fessenden v. Taft*, 65 N. H. 39; 17 Atl. 713; *Trust Co. v. Rathbun*, 5 Sawyer C. C. 32. An accommodation note is governed as to usury by the law of the place where it is negotiated and delivered. *Connor v. Donnell*, 55 Tex. 167; *Le Baron v. Van Brunt*, 9 Daly (N. Y.), 349; *Heath v. Griswold*, 18 Blatchf. 555. See *Dickinson v. Edwards*, 77 N. Y. 578.

A note void for usury by the law by which it is governed is unenforceable. *Holmes v. Manning* (Mass.), 19 N. E. 25.

A corporation empowered to lend money at a certain rate cannot enforce in the State of its creation an usurious loan made in another State. *Ewing v. Toledo Savings Bank*, 43 Ohio St. 31; *Larwell v. Hanover Savings Fund Society*, 40 Ohio St. 274.

7. (Rule 149.) THE INTERPRETATION AND OBLIGATION OF CONTRACTS. — The interpretation of a contract is governed by the law that the parties had in view, or may be presumed to have had in view, in making it. *Pritchard v. Norton*, 106 U. S. 124; *Codman v. Krell*, 152 Mass. 214; *Brown v. Ransey*, 74 Ga. 210. The same rule governs the obligations and rights of the parties. *Pritchard v. Norton*, 106 U. S. 124; *Grunwald v. Freese* (Cal.), 34 Pac. 73.

Unless the parties expressed their intention, the law with reference to which they contracted, or intended to contract, is a matter of inference, not only from the terms of the contract, but from the situation, the relation, and the objects of the parties. *Pritchard v. Norton*, 106 U. S. 124. Where a contract is made and is to be performed in the same place, the law of that place governs the obligations and rights of the parties. *Crumlish v. Central Imp. Co.* 38 W. Va. 390; 18 S. E. 456; *Champion v. Wilson*, 64 Ga. 184; *Cartwright v. R. R. Co.* 59 Vt. 675. Where the place of making and the place of performance are not the same, the law of the place of performance presumptively governs. *Pritchard v. Norton*, 106 U. S. 124; *Hall v. Cordell*, 142 U. S. 116; 12 Sup. Ct. 154; *Waverly Bank v. Hall*, 150 Pa. St. 466; 24 Atl. 665; *Crumlish v. Cent. Imp. Co.* 38 W. Va. 390; 18 S. E. 456; *Correll v. Georgia &c. Co.* 37 S. C. 444. In the absence of any indication to the contrary, the presumption is that the contract is to be performed at the place where it is made. *Tillinghast v. Boston Co.* 39 S. C. 484; 18 S. E. 120. This presumption rests upon the rule that the legal intention of the parties determines the law that is to govern. *Pritchard v. Norton*, 106 U. S. 124.

Where a contract is to be performed partly in one country and partly in another, each portion is governed in respect of performance by the law of the

place where it is to be performed. *Hartman v. Louisville & N. Ry. Co.* 39 Mo. App. 88.

Questions frequently arise as to where a contract was made. If a person residing in one State signs and sends to a person in another State a written contract, which is assented to and acted on in the latter State, the contract is made there. *Milliken v. Pratt*, 125 Mass. 374. Where an order is given and accepted in a certain place and the merchandise is delivered there to a carrier for shipment, the contract is governed by the law of the place of shipment. *Sullivan v. Sullivan*, 70 Mich. 583; *Fred. Miller Brewing Co. v. De France* (Iowa), 57 N. W. 959; *Engs & Son v. Priest*, 65 Iowa, 232. Where an order is given for goods in one State, to be shipped to another State and paid for on inspection, the contract is governed by the laws of the latter State. *Rindskopf v. De Ruyter*, 39 Mich. 1; *McIlwaine v. Legare*, 36 La. An. 359. See *McLane v. His Creditors* (La.), 16 So. 764. Where a person receives an offer in one State with the privilege of letting it stand open for a day, and telegraphs the next day from another State accepting the offer, the contract is made where the telegram is sent. *Perry v. Mount Hope Iron Co.* 15 R. I. 380; 5 Atl. 632. If a resident of one State orders goods from another State, and the order is silent as to the price, the price is determined by the market value of the goods at the place of business of the seller. *Deither v. Ferguson Lumber Co.* (Ind. App.) 35 N. E. 843.

Contracts with common carriers for the shipment of goods from one State or country to another are governed by the *lex loci contractus*. *Liverpool Steam Co. v. Phenix Ins. Co.* 129 U. S. 397; *Fairchild v. P. W. & B. R. R. Co.* 148 Pa. St. 527; *Forepaugh v. Railroad Co.* 128 Pa. St. 217; *Ryan v. Missouri, Kansas & C. Ry. Co.* 65 Tex. 13; *Hazel v. C., M. & St. P. Ry. Co.* 82 Iowa, 477; 48 N. W. 926; *Western & A. R. Co. v. Cotton Mills*, 81 Ga. 522; *Meuer v. Chicago, M. & St. P. Ry. Co.* (S. D.) 59 N. W. 945; *Hartman v. Louisville & N. Ry. Co.* 39 Mo. App. 88. See *Platt v. Richmond & C. R. R. Co.* 52 N. Y. Super. Ct. 496.

A contract of insurance is governed by the law of the place where it is made, which is usually the place where the policy is delivered and becomes effective. *Equitable Life Soc. v. Clements*, 140 U. S. 226; 11 Sup. Ct. 822; *Marden v. Hotel Owners' Ins. Co.* 85 Iowa, 584; 52 N. W. 509; *Wood v. Insurance Co.* 8 Wash. 427; 36 Pac. 267; *Insurance Co. v. Sawyer*, 160 Mass. 413; 36 N. E. 59; *Hicks v. Insurance Co.* 60 Fed. Rep. 690; 9 C. C. A. 215; *Estate of Breitung*, 78 Wis. 33; 46 N. W. 891; *Northwestern Co. v. Elliot*, 7 Sawyer C. C. 17; *Re State of Pennsylvania Ins. Co.* 22 Fed. Rep. 109; *Cromwell v. Royal Canadian Ins. Co.* 49 Md. 366; *Equitable Life Assur. Soc. v. Winning*, 58 Fed. Rep. 541; 7 C. C. A. 359; *Spencer v. Myers*, 73 Hun, 274; 26 N. Y. Supp. 371; *Mullen v. Reed*, 64 Conn. 240; 29 Atl. 478; *Knights Templar & C. Indemnity Co. v. Berry*, 50 Fed. Rep. 511; 1 C. C. A. 561. The contract may, however, be completed by the acceptance of the application at the home office. *Voorheis v. People's Mut. Ben. Soc.* (Mich.) 51 N. W. 1109; *Shattuck v. Mut. Life Ins. Co.* 4 Cliff. C. C. 598; *Todd v. State Ins. Co.* 11 Phila. 355. See *Ward v. Tucker*, 7 Wash. 399; 35 Pac. 1086. The power of an incorporated company to issue a policy is determined by the law of the State of its creation, *Supreme Council v. Green*, 71 Md. 263; 17 Atl. 1048; as is also the effect of false representations made in order to obtain the policy. *Fidelity Mutual Life Association v. Ficklin*, 74 Md. 172; 21 Atl. 680. An assignment of the policy is governed by the law of the place where the assignment is made. *Robinson v. Hurst*, 78 Md. 59; 26 Atl. 956; *Miller v. Campbell*, 140 N. Y. 457; 35 N. E. 651;

Brown's Appeal, 125 Pa. St. 303 ; 17 Atl. 419 ; 24 W. N. C. 77 ; *Union Cent. Life Ins. Co. v. Woods* (Ind. App.), 37 N. E. 180. The surrender of a paid-up policy is governed by the law of the place where the contract is consummated. *Pratt v. Globe Ins. Co.* (Tenn.) 17 S. W. 352.

8. (Rule 150.) DISCHARGE OF A CONTRACT. — See *Wharton, Conf. of L.* ss. 519-521 ; *Thomson-Houston Electric Co. v. Palmer* (Minn.), 53 N. W. 1137 ; *Gilman v. Stevens*, 63 N. H. 342 ; *Howard v. Fletcher*, 59 N. H. 151.

CHAPTER XXV.

PARTICULAR CONTRACTS.

(A) CONTRACTS WITH REGARD TO IMMOVABLES.¹

RULE 151.² — The effect of a contract with regard to an immovable is governed by the proper law³ of the contract (?).⁴

The proper law of such contract is, in general, the law of the country where the immovable is situate (*lex situs*).⁵

Comment.

This Rule is open to some doubt.⁶ It constitutes (if valid) an exception to the general doctrine, that all rights connected with land are to be determined by the *lex situs*.⁷

The limitations, therefore, to our Rule must be noted : —

First. Rule 151 does not apply to a conveyance. A contract

¹ See *Westlake*, 3rd ed., p. 261 ; *Nelson*, p. 277. Contrast *Story*, ss. 363–365.

² *Campbell v. Dent*, 1838, 2 Moore P. C. 292 ; *Cood v. Cood*, 1863, 33 L. J. Ch. 273 ; *Waterhouse v. Stansfield*, 1851, 9 Hare, 234 ; 1852, 10 Hare, 254. Compare *Mercantile Investment Co. v. River Plate &c. Co.* [1892] 2 Ch. 303.

³ As to meaning of “proper law,” see p. 540, *ante*.

⁴ See Exception 1 to Rule 138, p. 524, *ante*.

⁵ Compare *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115, 122.

See App., Note 13, *Law Governing Contracts with regard to Immovables*.

As to *Capacity*, see chap. xxii., p. 517, *ante* ; as to *Form*, see chap. xxii., pp. 517, 518, *ante*.

⁶ See, in support of Rule, *Westlake*, 3rd ed., p. 261, and *Nelson*, p. 277. Contrast, however, *Story*, ss. 363–365, who perhaps holds that executory contracts respecting real estate or immovables are governed wholly by the *lex situs*, and the language of Lord Mansfield in *Robinson v. Bland*, 1760, 2 Burr. 1077, 1079, viz.: “In every disposition or contract where the subject-matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus a conveyance or will of land, a mortgage, a contract concerning stocks, must be all sued upon in England ; and the local nature of the thing requires them to be carried into execution according to the law here.”

⁷ See Rule 138, p. 516, *ante*.

with regard to land may be governed by its proper law, but a conveyance or transfer of land, or of any interest in land, is certainly governed by the *lex situs*.¹

Secondly. English Courts will not enforce the doing of anything with regard to foreign land which the *lex situs* will not permit to be done.²

Thirdly. Parties who enter into a contract with regard to land may in general be presumed to contract with a view to the law of the country, *e. g.*, France, where the land is situate. Hence the *lex situs* is in general the proper law of the contract.³

Illustrations.

1. *X*, an Englishman, residing but not domiciled in Chili, and *A* and *B*, his brothers, Englishmen, residing and domiciled in England, have each of them an interest in certain land in Chili. *X* enters into negotiations with *A* and *B*, which are carried on by correspondence, for the purchase by *X* of *A*'s and *B*'s shares in the land. It is alleged on the part of *X* that the negotiations resulted in a contract whereby both *A* and *B* agreed to sell their share in the land to *X*. It is held by a Court in Chili that *A* did, and *B* did not, contract to sell his interest in the land. The contract is an English contract,⁴ and the question whether *B* contracted to sell his share in the land is to be determined in accordance with English law⁵ (proper law of contract).

2. *X* and *A* make an agreement in Scotland for the discharge of a mortgage of lands in Demerara by bills payable in Scotland. This is a Scotch contract, since, though referring to lands in Demerara, it is made and to be performed in Scotland. It is governed by, and to be interpreted in accordance with, Scotch law⁶ (proper law of contract).

¹ See *Story*, s. 424, cited p. 516, *ante*; and *Westlake*, 3rd ed., p. 189, cited p. 516, *ante*. *Norton v. Florence Land Co.* 1877, Ch. D. 332, 336.

² *Campbell v. Dent*, 1838, 2 Moore P. C. 292; *Waterhouse v. Stansfield*, 1851, 9 Hare, 234; 1852, 10 Hare, 254; *Westlake*, p. 261. Compare Rule 148, Exception 3, p. 560, *ante*.

³ See *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115, 122, 123.

⁴ For meaning of "English contract," see p. 554, note 5, *ante*. "But then arises this question: the law of which country is it governs the transaction and the actors in it? The right to land in Chili must, no doubt, be determined by their laws; but a contract entered into between three English gentlemen, two of them domiciled and residing in England and the third residing in Chili, but not having acquired a foreign domicile, must, I think, be governed and construed by the rules of English law." *Cood v. Cood*, 1863, 33 L. J. Ch. 273, 278, judgment of *Romilly*, M. R.

⁵ *Ibid.*

⁶ *Campbell v. Dent*, 1838, 2 Moore P. C. 292.

(B) CONTRACTS WITH REGARD TO MOVABLES.

RULE 152.¹—The effect of a contract with regard to a movable is governed by the proper law of the contract.

Comment.

Here, again, it is necessary to distinguish between a contract and a transfer or an assignment. A contract, *e. g.*, to sell a movable, is governed by the proper law of the contract, *i. e.*, by the law to which the parties must be taken to have intended, when contracting, to submit themselves. Whether the transfer or the assignment of a movable is valid, and therefore whether a contract to sell operates as a sale, depends, generally at any rate, on the law of the country where the movable is situate² (*lex situs*).

Illustration.

X & Co., a London firm, contract in London to sell to *A*, a merchant in London, 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port on board ships to be provided by *A*. The esparto is to be paid for by *A* in London. *X & Co.* fail to deliver the esparto. The failure arises from the fact that at the time for the performance of the contract there is an insurrection, and military operations are being carried on, in Algeria, and commands are issued by the French authorities in Algeria preventing³ the collection and transport of esparto. Under French law these circumstances, amounting to *force majeure*, are whilst under English law they are not a legal excuse for the non-performance of their contract by *X & Co.* English law is the proper law of the contract,⁴ and *X & Co.* are liable to pay damages for the non-performance thereof.⁵

¹ *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589. See as to assignment of movables, chap. xxiii., pp. 529–537, *ante*; as to capacity to contract, Rule 146, p. 543, *ante*.

² See Rules 140–142, pp. 530–535, *ante*; *Cammell v. Sewell*, 1860, 5 H. & N. 728; 29 L. J. Ex. 350 (Ex. Ch.); 1858, 3 H. & N. 617; 27 L. J. Ex. 447; *Castrique v. Imrie*, 1870, L. R. 4 H. L. 414; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238; *Hooper v. Gumm*, 1867, L. R. 2 Ch. 282; *In re Queensland &c. Co.* [1891] 1 Ch. 536, 545. Compare, however, *Cochrane v. Moore*, 1890, 25 Q. B. D. (C. A.) 57.

³ Prohibiting?

⁴ See Sub-Rule 3, p. 569, *ante*.

⁵ *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589. See note 5, p. 561, *ante*.

(C) CONTRACT OF AFFREIGHTMENT.¹

RULE 153.² — The term “law of the flag” means the law of the country³ whereof a ship carries the flag.

When the flag carried by a ship is that of a state⁴ including more than one country, the law of the flag means (semble) the law of the country where the ship is registered.⁵

Comment.

“The law of the flag” is a short expression for the law of the country under the flag of which a ship sails, and to which, therefore, she presumably belongs.⁶

The flag which a ship carries may be the flag of a state, such as the United States, which consists of several countries (*e. g.*, New York, Massachusetts, Louisiana, etc.) governed by different laws. When this is so, the flag does not of itself show what is the country to which the ship presumably belongs, and what, therefore, is the law of the flag. There is, at any rate, American authority for the statement that in this case the law of the flag is the law of the country where the ship is registered.⁷

Illustrations.

1. A ship carrying the Italian flag is about to sail from Havre for Bombay. The law of the flag is the law of Italy.

2. An American ship, carrying the flag of the United States

¹ See for nature of contract, 3 *Kent, Comm.*, 12th ed., ss. 201-251, and compare *Westlake*, 3rd ed., pp. 262, 263. See also, as to conflict of laws on the subject of carriage by sea, *Carver, Carriage by Sea*, chap. vii., ss. 201-217.

² See *MacLachlan*, 4th ed., pp. 65, 174; *Carver, Carriage by Sea*, ss. 203-206. Contrast, however, *Westlake*, 3rd ed., p. 262.

³ For the meaning of the term “country,” see pp. 64, 66, 67, *ante*.

⁴ For the meaning of the term “state,” see pp. 64, 68, *ante*.

⁵ *Wharton*, s. 441 and s. 357.

⁶ The country to which a ship in fact belongs is ultimately fixed by the nationality of her owner, and circumstances may exist under which a ship, for some purposes at any rate, belongs to a country of which she does not carry the flag. (See *Chartered Bank of India v. Netherlands Co.* 1883, 10 Q. B. D. [C. A.] 521, 534, 537, judgment of Brett, L. J.) The term “law of the flag” therefore is, by some writers, given a wider sense than that which it receives in Rule 153, and is used as equivalent to the personal law of the shipowner. (See *Westlake*, 3rd ed., p. 262.)

⁷ *Wharton, Conflict of Laws*, s. 441 and s. 357.

and registered at New Orleans, is at Liverpool about to sail for Hamburg. The law of the flag is the law of Louisiana.¹

RULE 154.²—Subject to the exception hereinafter mentioned, the effect and incidents of a contract of affreightment (*i. e.*, a contract with a shipowner to hire his ship, or part of it, for the carriage of goods) are governed by the law of the flag.

Provided that the contract will not be governed by the law of the flag, if from the terms or objects of the contract, or from the circumstances under which it was made, the inference can be drawn that the parties did not intend the law of the flag to apply.³

Comment.

This Rule is an application of Rule 149. The parties to a contract of affreightment, or, using more popular though not quite accurate language, for the carriage of goods by sea on board a particular ship, are presumed, in the absence of evidence to the contrary, to contract with reference to the law of the country to which the ship, from the flag at her masthead, may be seen, or at any rate may be presumed, to belong.⁴

Nor does it necessarily make any difference that, though the ship is a foreign ship carrying a foreign flag, the contract is made in England. It may still in general be presumed that the parties looked to foreign law as determining the effect of their contract.⁵

"*Lloyd v. Guibert*⁶ establishes," writes Mr. Carver, "that, where the shipowner's total liability is limited by the law of his own country, in which he is domiciled, and under whose flag he sails his ship, that limitation is to be implied in contracts to carry goods in her. Whether the contract be made by the master, under a limited authority, or by the owner himself, the law of the flag determines his liability in point of total amount."⁷

¹ *Wharton*, s. 441.

² Compare *Westlake*, 3rd ed., p. 262; *Carver, Carriage by Sea*, s. 206; *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115; *The Gaetano*, 1882, 7 P. D. (C. A.) 137; *The August*, [1891] P. 328, 340.

³ See *Carver*, s. 210; *Chartered Mercantile Bank of India v. Netherlands &c. Co.* 1883, 10 Q. B. D. (C. A.) 521; *The Industrie*, [1894] P. (C. A.) 58.

⁴ See *The Gaetano*, 1882, 7 P. D. (C. A.) 137, 149, 150, per *Cotton*, L. J.

⁵ *Ibid.*, p. 148, judgment of *Brett*, L. J.

⁶ 1865, L. R. 1 Q. B. 115.

⁷ *Carver*, s. 206.

But the reasoning in *Lloyd v. Guibert*, and in subsequent cases,¹ really goes further and establishes the wider proposition that, to adopt again the language of Mr. Carver, "the character of the obligations which are impliedly undertaken by the shipowner, so far as not varied or excluded by the contract, and with reference to which the contract is made, are also to be determined by the law of the flag. Hence it follows that the effect of the expressed terms in limiting or altering these obligations must be determined by the same law. Also, that the same law must govern the rights of the shipowner against the charterer or shipper, and the obligations of the latter under the contract. For the contract is a whole, and must be read in the light of one and the same consistent set of rules. The exceptions must be read with the obligations, and the obligations on one side with those on the other, for which they are the considerations, and of which they are frequently conditions."²

The proviso, however, contained in our Rule is itself a result of Rule 149.³ If from any circumstance it can be inferred that the parties to a contract for carriage by sea did not contract with a view to the law of the flag, then the law of the flag is not the proper law of the contract, and the contract is not governed thereby.⁴

Illustrations.

1. *A* charters a French ship belonging to *X* and *Y*, French owners, at a Danish West India port, for a voyage from Hayti to Havre, London, or Liverpool, at *A*'s option. The charter party is entered into by *N*, the master, in pursuance of his general authority as master. *A* ships a cargo at Hayti for Liverpool, with which the ship sails. On her voyage she sustains damage and puts into Fayal, a Portuguese port, for repair. *N* there borrows money from *B* on bottomry of the ship, freight, and cargo, and repairs the ship. She completes her voyage to Liverpool. *B*, the bondholder, proceeds in the English Court of Admiralty against the ship, freight, and cargo, which are insufficient to satisfy the bond. The deficiency is paid by *A*. *X* and *Y* give up the ship and cargo to *A*, and are thereby, according to French law, freed from all liability on the contract of *N*, *i. e.*, on the bottomry bond. *A*

¹ See *The Gaetano*, 1882, 7 P. D. (C. A.) 137; *The August*, [1891] P. 328.

² *Carver*, s. 206.

³ See p. 563, *ante*.

⁴ *Chartered Bank of India v. Netherlands Steam Co.* 1883, 10 Q. B. D. (C. A.) 521; *The Industrie*, [1884] P. (C. A.) 58.

claims indemnity against *X* and *Y* for money paid to *B*. The rights of *A* and the liabilities of *X* and *Y* are governed by the law of France, *i. e.*, law of the flag.¹

2. *X*, an Englishman, ships a cargo at New York on board an Italian ship for carriage to London. The ship is at the island of Fayal (Portuguese territory) in distress. *N*, the master, there borrows £2,000 on bottomry of the ship, cargo, and freight, to enable her to proceed on her voyage to London. *N* has the means of communicating with *X*, but does not do so. The bond, under the circumstances, is valid according to Italian law (law of the flag), but would not be valid according to English law. The bond is valid and binds the cargo (*i. e.*, the authority of the master and the validity of the bond is to be determined, as against *X*, by the law of the flag).²

3. A German ship, while in a German port, is chartered by English charterers under a charter party in the English language. The ports of call for orders and delivery of cargo are English. A question arises with reference to delay in delivery of cargo. The contract (*semble*) is governed by English law.³

4. *A* is a German shipowner domiciled in Germany. *A*'s ship, carrying the German flag and with a German master, is in a French port. *X* & *Co.* are London merchants. A contract (charter party) is entered into in London between *A* and *X* for carriage, on board *A*'s ship, of a cargo of rice from India to England. The contract is on an ordinary English printed form, and the terms are the terms of an ordinary English charter party. It contains special provisions as to the payment of freight on right delivery. On the voyage home, the ship is driven into a port of distress, where part of the cargo is sold. If the contract is governed by the law of the flag (German law), then *A* is entitled to the payment of full freight; if the contract is governed by English law, then *A* is not entitled to the payment of freight for the cargo sold. The circumstances of the case, and especially the provisions as to payment of freight, show an intention to contract under English law. The law of the flag is excluded, the contract is governed by English law, and *A* is not entitled to full freight.⁴

¹ *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. (Ex. Ch.) 115.

² *The Gaetano*, 1882, 7 P. D. (C. A.) 137, and contrast *The Hamburg*, 1864, Br. & L. 253; 33 L. J. P. & M. 116; but note the suggestion of *Brett*, L. J., 7 P. D. p. 147, that *The Hamburg* may have been rightly decided because foreign law was not proved in that case.

³ *The San Roman*, 1872, L. R. 3 A. & E. 583.

⁴ *The Industrie*, [1894] P. (C. A.) 58.

Exception.¹—The mode of performing particular acts under a contract of affreightment (e. g., the loading or unloading or delivery of goods) may be governed by the law of the country where such acts take place.

SUB-RULE.²—The authority of the master of a ship to deal with the cargo during the voyage, and the manner in which he should execute it, are governed by the law of the flag.

Comment.

The Sub-Rule is an application of Rule 154.³ But in this instance, as often happens, a special application of a general legal principle is supported by a greater amount of authority than the principle itself; in other words, the cases which establish the rule that a contract of affreightment is generally governed by the law of the flag are, many of them, decisions having reference to the master's authority⁴ during the voyage to deal with the cargo. The extent of his authority and the conditions under which it may be exercised differ somewhat under the laws of different countries, but when a conflict arises on this point the law of the flag prevails.⁵

Illustrations.

1. A German ship, sailing under the German flag, is loading at Singapore for London. She there takes on board a cargo shipped by British subjects under English bills of lading in the usual form. In the course of the voyage the ship is driven into a port of distress, and the master there sells part of the cargo. The master's authority to make the sale is governed, not by the law of England, but by the law of Germany (law of the flag).⁶

2. An Italian ship, sailing under the Italian flag and with an Italian master, is at Fayal, a Portuguese port, laden with a cargo,

¹ *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. (Ex. Ch.) 115, 125, 126. Compare *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589, 604, judgment of Bowen, L. J.; *Norden Steam Co. v. Dempsey*, 1876, 1 C. P. D. 654. See *Carver, Carriage by Sea*, s. 207, and Rule 149, Sub-Rule 3, Second Presumption, p. 570, ante.

² *Carver*, s. 211; *Lloyd v. Guibert*, 1865 (Ex. Ch.), L. R. 1 Q. B. 115; *The Gaetano*, 1882, 7 P. D. (C. A.) 137; *The August*, [1891] P. (C. A.) 328. Compare *The Karnak*, 1869, L. R. 2 P. C. 505, and especially pp. 511–513, for language of judgment delivered by Sir W. Erle.

³ See p. 590, ante.

⁴ *The Gaetano*, 1882, 7 P. D. (C. A.) 137; *The August*, [1891] P. (C. A.) 328.

⁵ See *Carver*, s. 211.

⁶ *The August*, [1891] P. (C. A.) 328.

owned by *X & Co.*, who are domiciled in England, and is bound on a voyage to London. The master borrows money on bottomry of the ship and cargo. The authority of the master to execute a bottomry bond is governed by the law of Italy (law of the flag).¹

(D) *CONTRACT FOR THROUGH CARRIAGE OF PERSON OR GOODS.*²

RULE 155.³ — The effect of a contract for the carriage of person or goods from a place in one country to a place in another is, as to its general incidents, presumably governed by the law of the place where it is made; but, as to transactions taking place in a particular country, may in certain cases be governed by the law of such country.

Comment.

There is great uncertainty as to what is the law governing a contract for through carriage of person or goods, which may often be partly by land and partly by water, from a place, *e. g.*, London, in one country, to a place, *e. g.*, Paris, in another.⁴ Here, as elsewhere, the only ultimate test for determining the law by which a contract is governed is the presumed intention of the parties;⁵ but, in the kind of contracts with which we are dealing, it constantly happens that no one salient consideration presents itself from which the intention of the parties may be inferred. All that can be strictly laid down is, that English Courts, while giving weight to the particular circumstances of each case, still lean, on the whole, to the doctrine that a contract for through carriage is, *primâ facie*, governed by the law of the country where it is made (*lex loci contractus*),⁶ and exhibit also a tendency to hold that a contract which can in any way be connected with England is, *primâ*

¹ *The Gaetano*, 1882, 7 P. D. (C. A.) 137.

² See *Carver*, s. 212.

³ *Branley v. S. E. Ry. Co.* 1862, 12 C. B. N. s. 63; *Peninsular & Oriental Co. v. Shand*, 1865, 3 Moore P. C. N. s. 272; *Cohen v. S. E. Ry. Co.* 1877, 2 Ex. D. (C. A.) 253. But contrast *De Clermont v. Brasch*, 1885, 1 Times L. R. 370.

⁴ See *Carver*, s. 212.

⁵ See Rule 143, p. 540, *ante*, and Rule 149, p. 563, *ante*.

⁶ *Peninsular & Oriental Co. v. Shand*, 1865, 3 Moore P. C. N. s. 272, and see Rules for determining the proper law of a contract, Sub-Rule 3, First Presumption, p. 569, *ante*.

facie at any rate, an English contract governed by English law. When, further, as frequently happens in contracts for through carriage, a provision of the contract is valid if governed by the law of one country, but invalid if governed by the law of another country, our Courts are inclined to hold that the contract is governed by the law which gives validity to all its terms.¹

A suggestion well worth consideration has been made that a "contract for through carriage" may be governed, as to incidents arising in a given country, by the law of the particular country where they take place; thus if *A* takes in Paris a ticket for the journey from Paris to London, and he is himself injured or his goods are lost in France, his rights may, in respect of the injury or loss, possibly, whatever be the law otherwise governing the contract, depend on the law of France.²

Illustrations.

1. *A* is a passenger travelling, by an English vessel belonging to an English company, from England to the Mauritius *viâ* Alexandria and Suez. He has taken a ticket in England containing conditions exempting *X & Co.* from liability for loss of luggage. *A*'s luggage is lost on the journey. The condition is valid by English law, but is not valid by the law of Mauritius. The contract is governed by English law (*lex loci contractus*) and the condition is valid.³

2. *X & Co.* are a railway company incorporated under English Acts of Parliament for conveyance of passengers and goods from London to Folkestone, and authorised by statute to maintain packets between Folkestone and Boulogne. *A* at Boulogne delivers parcels to *X & Co.* to be carried to London. The contract of carriage contains conditions which may be invalid according to the law of England, but are valid according to the law of France. The contract (*semble*) is governed by the law of France⁴ (*lex loci contractus*).

¹ See especially, *Peninsular & Oriental Co. v. Shand*, 3 Moore P. C. N. S. 272, 291, 292, judgment of P. C., and compare *In re Missouri Steamship Co.* 1889, 42 Ch. D. (C. A.) 321. Whether this mode of reasoning is legitimate may, it is conceived, be open to doubt.

² See *Cohen v. S. E. Ry. Co.* 1877, 2 Ex. D. (C. A.) 253, 262, judgment of Brett, L. J.

³ *The Peninsular & Oriental Co. v. Shand*, 1865, 3 Moore P. C. N. S. 272. Conf. *In re Missouri Steamship Co.* 1889, 42 Ch. D. (C. A.) 321.

⁴ See *Branley v. S. E. Ry. Co.* 1862, 12 C. B. N. S. 63, 72, judgment of Erle, C. J. The case is not decisive, since it was doubtful whether the contract was invalid under English law.

3. *X & Co.*, an English railway company, subject to English statutes as to carriage by rail and authorised to keep steamers for communication between Boulogne and Folkestone, contract with *A*, an Englishman, for the carriage of himself and his luggage from Boulogne to London. *A* takes his ticket at Boulogne. On the ticket there is a condition exempting *X & Co.* from liability for loss of luggage of greater value than £6. *X*'s box, containing articles of greater value than £6, is lost during transfer from steamboat to train at Folkestone. By French law a carrier cannot protect himself, by conditions, against results of negligence. Whether the contract is governed by English or by French law? ¹

4. *A* contracts at a railway station in Paris for the carriage of himself and luggage from Paris to London. He is to be carried from Paris to Calais by a French railway company, from Calais to Dover by an English steamboat belonging to the S. E. Ry. Co., and from Dover to London by the S. E. Ry. Co. His goods are lost and he is injured at Amiens in consequence of an accident arising from the negligence of the railway company's servants. Whether the contract is, as to the damage done to *A* and his goods, governed by French law or by English law? ²

(E) AVERAGE ADJUSTMENT.

RULE 156.³—As amongst the several owners of property saved by a sacrifice, the liability to general average ⁴ is

¹ *Cohen v. S. E. Ry. Co.* 1877, 2 Ex. D. (C. A.) 253. It was not necessary to decide this point, as the Court held that the condition was not valid either under English or French law. *Mellish*, L. J., says: "I confess for my own part that, the contract being made by an English passenger with an English railway company regulated by English law, I should have supposed that it ought to be governed by the law of England, and be taken as made with regard to the law of England" (pp. 257, 258). *Baggallay*, L. J., says: "As to whether [the contract] should be construed according to the law of France or England, I desire not to express any decided opinion, though it appears to me, as at present advised, that there is much to be said in favour of its being construed according to the law of France" (pp. 261, 262). *Brett*, L. J., holds that "this particular contract is an English contract to be performed according to the English law" (p. 263), but throws out the suggestion that contracts of the kind may perhaps be governed by different laws as to incidents taking place in different countries (p. 262).

² See *Cohen v. S. E. Ry. Co.* 1877, 2 Ex. D. (C. A.) 253, 262, 263, judgment of *Brett*, L. J.

³ See *Lowndes, Law of Marine Insurance*, s. 339.

⁴ "General average is a loss arising from a sacrifice purposely made for the preservation of the ship and all on board from danger, — whether the sacrifice consists of throwing overboard cargo, destroying this or that portion of

governed by the law of the place (called hereinafter the place of adjustment) at which the common voyage terminates (that is to say), —

- (1) when the voyage is completed in due course, by the law of the port of destination ; or,
- (2) when the voyage is not so completed, by the law of the place where the voyage is rightly¹ broken up and the ship and cargo part company.

Comment.

“As amongst the several owners of the property saved by a sacrifice, the liability to general average is determined by the law of the place at which the common adventure terminates, that is to say, the law of the port of destination, when the voyage is completed, and, when it is not, the law of the place where the voyage is broken up and the ship and cargo part company.”²

Our Rule is in fact an application of the principle, that the proper law of a contract as to the mode of performance is the law of the country where the performance is to take place.³ The intention of the parties is, that the average adjustment shall be made, *i. e.*, the contract as to this matter be performed, at the place where the voyage rightly terminates. It is, therefore, presumably their intention that the adjustment be governed by the law of such place.

RULE 157.⁴ — An underwriter is bound by an average

“the ship, or adopting measures which involve extraordinary expenditure, — which sacrifice, being made on behalf of all, must be replaced by the contribution of all. Thus it appears that general average has properly nothing whatever to do with marine insurance, this contribution being a right which exists independently of it, and, indeed, which existed many centuries before insurance was invented. Its connection with the law of insurance is restricted to a single point, viz., the liability of the insurer to pay back that which his assured has paid as his share.” *Lowndes*, s. 334.

¹ See *Hill v. Wilson*, 1879, 4 C. P. D. 329, 333, judgment of Lindley, J.

² *Lowndes*, s. 339, citing *Fletcher v. Alexander*, 1868, L. R. 3 C. P. 375, and *Hill v. Wilson*, 1879, 4 C. P. D. 329. Compare *Harris v. Scaramanga*, 1872, L. R. 7 C. P. 481; *Mavro v. Ocean Mar. Ins. Co.* 1875, L. R. 10 C. P. (Ex. Ch.) 414. Both the latter cases refer to liability of underwriters, and in both the policy contains the words “general average as per foreign statement.”

³ See Rule 149, Sub-Rule 3, Second Presumption, p. 570, *ante*.

⁴ See *Lowndes*, s. 339; *Harris v. Scaramanga*, 1872, L. R. 7 C. P. 481; *Mavro v. Ocean Mar. Ins. Co.* 1875, L. R. 10 C. P. (Ex. Ch.) 414. Conf. *Atwood v. Sellar*, 1880, 5 Q. B. D. (C. A.) 286.

adjustment duly taken according to the law of the place of adjustment.

Comment.

"The average, if rightly adjusted according to the right place for adjusting it, is as obligatory on the insurer [underwriter] as on the assured who has paid money under it; and it is beside the question to inquire whether the average has been rightly adjusted according to the law of England."¹

RULE 158. — An English insurer of goods shipped by an English merchant on board a foreign ship is not affected by the law of the flag.²

Comment.

The general rule as to the law governing an underwriter's liability has been thus laid down in reference to a particular case: —

"It is no doubt competent to an underwriter on an English policy to stipulate, if he think fit, that such policy shall be construed and applied in whole or in part according to the law of any foreign state, as if it had been made in and by a subject of the foreign state, and the policy in question does so stipulate as regards general average; but, except when it is so stipulated, the policy must be construed according to our law, and without regard to the nationality of the vessel."³

Illustration.

A, an English merchant, effects a policy of insurance with *X*, an English underwriter, upon goods shipped in a French ship. The ship puts into port for repairs. The master gives a bottomry bond on ship, freight, and cargo. The ship and freight proving insufficient to satisfy the bond, *A* has to pay the deficiency in order to obtain possession of the goods. This, according to French law, might be a loss by perils of sea, but it is not so according to English law. If it is a loss by perils of sea, *A* has a right to recover the amount paid from *X*. The rights of *A* against *X* must be determined wholly by English law. *A* has no right to recover from *X* the amount paid to release the goods.⁴

¹ *Lowndes*, s. 339.

² *Greer v. Poole*, 1880, 5 Q. B. D. 272.

³ *Ibid.*, per *Lush*, J.

⁴ *Ibid.*

(F) PROVISIONS OF BILLS OF EXCHANGE ACT, 1882,
AS TO CONFLICT OF LAWS.¹*Bill of Exchange.*

[RULE 159. — Bills of Exchange Act, 1882, s. 2 (part) and s. 4.] In this Act, unless the context otherwise requires:—

- [1] "Acceptance" means an acceptance completed by delivery or notification.²
- [2] "Bearer" means the person in possession of a bill or note which is payable to bearer.
- [3] "Bill" means bill of exchange, and "note" means promissory note.
- [4] "Delivery" means transfer of possession, actual or constructive, from one person to another.³
- [5] "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.⁴

¹ Rules 159 to 163 consist of sections of the Bills of Exchange Act, 1882, which have reference, directly or indirectly, to the conflict of laws. At the cost of some awkwardness of expression, the language of the Act is followed verbatim, except where words or figures are added; every addition is printed within square brackets.

From the fact that Rules 159 to 163 are citations from an Act of Parliament, the law is not here, as throughout the rest of this Digest, stated in the form of Rules and Exceptions. Had this form been adhered to, the language of the Act must have been slightly varied, the sub-sections would have appeared as separate Rules, and the provisos thereto as, what they really are, exceptions to a Rule. In reference to Rules 159 to 163, the word "sub-section" is used instead of "clause" in order to emphasise the fact that each of these Rules is a statutory enactment. The illustrative comment is placed, not at the end of each Rule, but after that part of each enactment, *e. g.*, sub-section, which the comment most naturally follows.

The reader is especially referred to *Chalmers' Digest of the Law of Bills of Exchange*, 4th ed.: it is an elaborate and almost authoritative exposition of the law embodied in the Bills of Exchange Act, 1882. I have, with Mr. Chalmers' permission, made use of his commentary and illustrations, and in fact have, wherever it was possible, followed his treatise. For valuable criticism on the Act, see *Westlake*, 3rd ed., pp. 265-273.

² See Bills of Exchange Act, 1882, s. 2, and compare s. 21; *Chalmers*, 4th ed., pp. 3, 52; *Smith v. McClure*, 1804, 5 East, 476.

³ *Chalmers*, 4th ed., pp. 4, 52.

⁴ Conf. Bills of Exchange Act, 1882, s. 38, as to "rights of holder;" s. 29, "as to holder in due course;" and s. 31, as to "negotiation." See *Chalmers' Digest*, 4th ed., pp. 5, 121; 88, 102.

- [6] "Indorsement" means an indorsement completed by delivery.¹
- [7] "Issue" means the first delivery of a bill or note, complete in form, to a person who takes it as a holder.²
- [8] "Person" includes a body of persons, whether incorporated or not.
- [9] "Value" means valuable consideration.³
- [10] "Written" includes printed, and "writing" includes print.
- [11] (1) An inland bill is a bill which is or on the face of it purports to be
 - (a) both drawn and payable within the British Islands, or
 - (b) drawn within the British Islands upon some person resident therein.

Any other bill is a foreign bill.

For the purposes of this Act, "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

- (2) Unless the contrary appear on the face of the bill, the holder may treat it as an inland bill.⁴

¹ See *Chalmers*, p. 6, and compare s. 21, *Chalmers*, p. 52.

² *Chalmers*, 4th ed., p. 6. For stamp purposes, "a bill is not to be deemed to be issued until it has reached the hands of a holder for value." *Chalmers*, 4th ed., pp. 7 and 215.

³ For definition of "valuable consideration," see further, Bills of Exchange Act, 1882, s. 27.

"(1) Valuable consideration for a bill may be constituted by, —

"(a) Any consideration sufficient to support a simple contract ;

"(b) An antecedent debt or liability. Such a debt or liability
"is deemed valuable consideration whether the bill is
"payable on demand or at a future time.

"(2) Where value has at any time been given for a bill, the holder is
"deemed to be a holder for value as regards the acceptor and
"all parties to the bill who became parties prior to such time.

"(3) Where the holder of a bill has a lien on it arising either from con-
"tract or by implication of law, he is deemed to be a holder for
"value to the extent of the sum for which he has a lien."

⁴ See *Chalmers*, 4th ed., p. 15.

Comment.

As to Rules taken from the Bills of Exchange Act, 1882.—Any conflict of laws with regard to bills of exchange is now determined by the Bills of Exchange Act, 1882, in so far as that statute applies. The Act, however, is not exhaustive,¹ and the sections relating to the conflict of laws do not settle all the questions of private international law in regard to a bill which might be raised in an English Court. These sections follow in the main the principles laid down in the preceding Rules of this Digest. The Bills of Exchange Act reproduces, for the most part, the effect of decided cases which themselves are in conformity with the principles of private international law adopted by English Courts, and which, though decided before the passing of the Act, may still with advantage be consulted.²

The passing of the Bills of Exchange Act gives, it is submitted, no reason for altering the opinion published some years ago by the present writer,³ that the rules determining the rights and liabilities of the different parties to a bill are, as regards the conflict of laws, with rare exceptions, the applications of two principles,—first, that the formal validity of a contract is determined by the law of the country where the contract is made;⁴ and, secondly, that the interpretation of a contract and the rights and obligations arising under it are determined in accordance with the law to which the parties may be presumed to have intended to submit themselves, i. e., the proper law of the contract.⁵

¹ *Ex parte Roberts*, 1886, 18 Q. B. D. (C. A.) 286.

² See *Burrows v. Jemino*, 1726, 2 Strange, 733; *Mellish v. Simeon*, 1794, 2 H. Bl. 378; *Kearney v. King*, 1819, 2 B. & Ald. 301; *Wynne v. Jackson*, 1826, 2 Russ. 351; *Don v. Lippmann*, 1837, 5 Cl. & F. 1; *De la Chaumette v. Bank of England*, 1831, 2 B. & Ad. 385; *Trimbey v. Vignier*, 1834, 1 Bing. N. C. 151; *Cooper v. Waldegrave*, 1840, 2 Beav. 282; *Rothschild v. Currie*, 1841, 1 Q. B. 43; *Allen v. Kemble*, 1848, 6 Moore P. C. 614; *Ralli v. Dennistoun*, 1851, 6 Ex. 483; *Gibbs v. Fremont*, 1853, 9 Ex. 25; *Sharples v. Rickard*, 1857, 2 H. & N. 57; *Suse v. Pompe*, 1860, 8 C. B. n. s. 538; *Scott v. Pilkington*, 1862, 2 B. & S. 11; *Hirschfeld v. Smith*, 1866, L. R. 1 C. P. 340; *Lebel v. Tucker*, 1867, L. R. 3 Q. B. 77; *Bradlaugh v. De Rin*, 1868, L. R. 3 C. P. 538; 1870, L. R. 5 C. P. (Ex. Ch.) 473; *Rouquette v. Overmann*, 1875, L. R. 10 Q. B. 525; *Goodwin v. Roberts*, 1876, 1 App. Cas. 476; *Willans v. Ayers*, 1877, 3 App. Cas. 133; *Horne v. Rouquette*, 1878, 3 Q. B. D. (C. A.) 514; *In re Marcellus &c. Co.* 1885, 30 Ch. D. 598; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

³ See "Conflict of Laws and Bills of Exchange," *American Law Review*, July, 1882.

⁴ See Rule 147, p. 549, *ante*.

⁵ See Rule 149, p. 563, *ante*.

[RULE 160.¹—Bills of Exchange Act, 1882, s. 72.]
Where a bill drawn in one country is negotiated,² accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

- (1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity, as regards requisites in form, of the supervening contracts, such as acceptance or indorsement, or acceptance *suprà* protest, is determined by the law of the place where such contract was made.

Provided that—

- (a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:
- (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

Comment.

Bill of exchange and conflict of laws.—A bill of exchange is an instrument embodying, not one contract, but a series of different though interconnected contracts; or may, perhaps, be more

¹ *Chalmers*, 4th ed., pp. 238–244.

² “(1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

“(2) A bill payable to bearer is negotiated by delivery.

“(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

“(4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

“(5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.” (Bills of Exchange Act, 1882, s. 31.)

accurately described as a congeries of contracts hanging on to one original contract, which always has a certain effect on the others. The instrument no doubt has, as a whole, certain peculiarities. It exists for one object, namely, to secure to the holder the payment in due course of the sum for which the bill is drawn; but the several contracts entered into for this purpose by the drawer, the acceptor, and the indorser respectively, and therefore the several rights and liabilities of each of these parties, are distinct and different. This is a matter which ought not to be overlooked, for many difficulties which have perplexed judges and text-writers, when called upon to deal with the conflict of laws in reference to the rights or obligations of the parties to a bill, have arisen from the habit of regarding a bill as a single contract, instead of regarding it as what it really is, — an instrument containing several distinct contracts. These several contracts have one feature in common: they are each perfected by delivery.¹ This matter becomes of consequence when we are called upon to determine what is the place at which the contract of a party to a bill, say the acceptor or the indorser, is made or completed.

A bill is clearly an instrument which from its nature is likely to give rise to a conflict of laws. It may be drawn in one country, *e. g.*, France; be accepted in another, *e. g.*, England; be indorsed in a third, *e. g.*, Belgium; and be payable in a fourth, *e. g.*, Germany. The law of each of these countries may, conceivably at any rate, affect the validity of the bill, or the rights or obligations of the parties to it. It may be necessary to determine, as in the case of other contracts, whether the bill, or a contract embodied in the bill, is valid as regards its *form*, and what therefore is the law determining its formal validity. It may be further necessary to determine what are the rights or obligations of each of the parties to a bill, and therefore to determine what is the law governing the *interpretation* and *obligation* of each contract.

Form. — Sub-section 1 deals with the *formal validity* of a bill and of each contract contained in it.

The principle laid down in this sub-section, independently of the provisos by which the effect of the sub-section is modified, exactly corresponds with Rule 147.² The formal validity of a bill and of the several contracts contained therein depends on the law of the country where each contract is made or completed. Hence the validity of the bill itself is governed by the law of the place of issue, *i. e.*, by the law of the place where the bill, being complete in form, is first delivered to a person who takes it as holder; the

¹ See Bills of Ex. Act, 1882, s. 21; and *Chalmers*, 4th ed., p. 52 and notes.

² See p. 549, *ante*.

formal validity of the acceptance is determined by the law of the place where the acceptor's contract is complete.

The provisos are in reality exceptions to the principles enunciated in sub-section 1.

As to proviso (a). Independently of the Bills of Exchange Act, 1882, it would seem that where a bill issued abroad is, on account of its not being stamped in accordance with the law of the place of issue, *absolutely void* and not merely inadmissible in evidence at the place of issue, it would be void in England.¹ Under the Act, however, such a bill is now clearly not invalid in the United Kingdom for want of the stamp with which it ought to have been stamped in the country, *e. g.*, France, where it was issued.

This proviso, however, applies only to invalidity arising from the want of the stamp. It has no reference to any other cause of invalidity.

As to proviso (b). This second proviso, again, is a partial deviation from the principle that the formal validity of a contract depends on the law of the place where it is made. Under it a bill, which for defect of form is void in the country where it is issued, may be valid in the United Kingdom; and so, again, it would seem, an indorsement or acceptance invalid in respect of form, by the law of the country where it takes place, might be valid in the United Kingdom.

The validity, however, of a bill under this proviso is subject to three limitations:—

First. It must conform, as regards requisites in form, to the law of the United Kingdom.

Secondly. It can be treated as valid only for the purpose of enforcing payment.

Thirdly. The bill is to be treated as valid only between persons who negotiate, hold, or become parties to it in the United Kingdom.

Illustrations.

Sub-section 1.

1. By German law a bill need not express the value received. By French law it must. A bill drawn in Germany, but payable in Paris, which does not express the value received, is valid.

2. By the law of Illinois a verbal acceptance is valid. A bill

¹ See *Clegg v. Levy*, 1812, 3 Camp. 166; *Bristow v. Sequeville*, 1850, 5 Ex. 275; *Chalmers*, 4th ed., p. 239.

drawn in London on a town in Illinois is verbally accepted there. The acceptance is valid.¹

Proviso (a).

3. A bill is issued in a foreign country. It is not stamped, as required by the law of such country, and is therefore void there. It is not on this account invalid in England.

Proviso (b).

4. A bill is drawn in France by a domiciled Frenchman in the French language, in an English form (and indorsed in blank), on an English company, by whom the bill is accepted payable in London. As regards the acceptor the bill is an English bill, and is to be treated as valid. The effect under French law of an indorsement in blank is immaterial.²

5. A bill drawn and payable in France expresses no value received, and is therefore invalid according to French law. It is indorsed in England. The indorser could be sued here³ under proviso (b), though the drawer could not.

(2) Subject to the provisions of this Act,⁴ the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà* protest of a bill is determined by the law of the place where such contract is made.⁵

Provided that where an inland bill is indorsed in a foreign country [*i. e.*, a country not forming part of the British Islands⁶], the indorsement

¹ See *Chalmers*, p. 239.

² See *Smallpage's & Brandon's Cases*, 1885, 30 Ch. D. 598. The case refers to bills made before the passing of the Bills of Exchange Act, 1882, but at any rate, if the acceptance took place in London, is an illustration of proviso (b). See *Chalmers*, p. 239, note 1.

³ Cf. *Wynne v. Jackson*, 1826, 2 Russ. 351, 634. See *Chalmers*, p. 239.

⁴ The provisions referred to are the remaining sub-sections of the Bills of Exchange Act, 1882, s. 72, or, in other words, the other sub-sections or clauses of Rule 160, and also possibly the Bills of Exchange Act, 1882, ss. 15, 53 (see *Chalmers*, p. 240, note 2), which do not, however, appear to have any very direct bearing on the conflict of laws. Thus s. 53 refers to a difference between the law of England and the law of Scotland in respect of the effect of a bill as an assignment of a fund in the hands of a drawee.

⁵ *Allen v. Kemble*, 1848, 6 Moore P. C. 314; *Horne v. Rouquette*, 1878, 3 Q. B. D. (C. A.) 514, 520, judgment of *Brett*, L. J.

⁶ Compare definition of "British Islands," p. 600, *ante*, taken from the Bills

shall, as regards the payer, be interpreted according to the law of the United Kingdom.¹

Comment.

On this sub-section the remarks of Mr. Chalmers merit particular attention.

"The term 'interpretation,'" he writes, "in this sub-section, it is submitted, clearly includes the obligations of the parties as deduced from such interpretation."²

"Story,³ s. 154, points out the reasons of the rule adopted in this sub-section. 'It has sometimes been suggested,' he says, 'that this doctrine is a departure from the rule that the law of the place of payment is to govern. But, correctly considered, it is entirely in conformity with that rule. The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn, but only to guarantee its acceptance and payment in that place by the drawee; and, in default of such payment, they agree, upon due notice, to reimburse the holder in principal and damages when they respectively entered into the contract.'

"The case of a bill accepted in one country but payable in another gives rise to a difficulty. Suppose a bill is accepted in France, payable in England. Perhaps the maxim, *Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit*, would apply. But if not, then comes the question, what is the French law, not as to bills accepted and payable in France, but as to bills accepted in France payable in England? Probably the *lex loci solutionis* would be regarded. Cf. *Nouguier*, s. 1419."⁴

It is therefore doubtful whether, when a bill is accepted in one country, *e. g.*, England, and made payable in another, *e. g.*, France, the obligations of the acceptor are governed, as the words of the section strictly taken imply, by the law of the country where the bill is accepted (*lex loci contractus*), or, as they ought to be on

of Exchange Act, 1882, s. 4. Note that "British Islands" includes more than the United Kingdom. Note also that "foreign" is here used in a sense different from, and less extensive than, the sense given it in the other Rules in this Digest. See pp. 64, 68, *ante*.

¹ *Lebel v. Tucker*, 1867, L. R. 3 Q. B. 77.

² Compare *Westlake*, 3rd ed., p. 268.

³ *Story, Commentary on the Law of Bills of Exchange*.

⁴ *Chalmers*, 4th ed., p. 241.

principle,¹ by the law of the country where the bill is made payable (*lex loci solutionis*).

The probable explanation of this difficulty is curious. Story's expressions² have apparently suggested the terms of sub-section 2. Story's language may be read, and probably was read by the persons engaged in considering the bill, as meaning that the obligations of the parties to a bill are governed by the law of the place where each party contracts. But this is not his real meaning; he clearly intends to lay down, though in a very roundabout way, that each contract embodied in a bill is to be interpreted by the law of the country where it is to be performed (*lex loci solutionis*). Unfortunately the language of sub-section 2 reproduces the words rather than the meaning of Story. The result is, that if the terms of the sub-section be strictly interpreted, the obligations of an acceptor are to be governed, not, as Story intended, by the *lex loci solutionis*, but by the *lex loci contractus*. Mr. Chalmers' suggestion to a certain extent meets the objections to this result, but it may be doubted whether his suggestion is not in conformity rather with the doctrine of Story, when properly understood, than with the language of the Bills of Exchange Act, 1882, s. 72, sub-s. 2.

Illustrations.

1. An English note payable to bearer is negotiated by delivery in a country where this mode of transfer is not recognised. The title to the note passes by such delivery.³

2. Action in England on a bill drawn in Belgium and indorsed in blank in France. The effect of such indorsement is determined according to French law, *i. e.*, it operates as a "procuration."⁴

3. A general acceptance given in Paris is to be interpreted according to French law.⁵

4. A bill drawn in Belgium on England is indorsed in France in blank. The indorsement is (perhaps) to be interpreted according to French law as regards the indorser.⁶

¹ Compare *Rouquette v. Overmann*, 1875, L. R. 10 Q. B. 525.

² Compare Story, *Commentary on the Law of Bills of Exchange*, ss. 153, 154.

³ *De la Chaumette v. Bank of England*, 1831, 2 B. & Ad. 385; *Chalmers*, 4th ed., p. 240.

⁴ *Trimbey v. Vignier*, 1834, 1 Bing. N. C. 151. Conf. *Nouguier*, ss. 747-760; *Bradlaugh v. De Rin*, 1868 L. R. 3 C. P. 538, per *Willes*, J. See *Chalmers*, 4th ed., p. 240, note 6.

⁵ Conf. *Don v. Lippmann*, 1837, 5 Cl. & F. 1, 12, 13. And see *Wilde v. Sheridan*, 1852, 21 L. J. Q. B. 260.

⁶ *Bradlaugh v. De Rin*, 1868, L. R. 3 C. P. 538. Compare *Chalmers*, 4th ed., p. 240.

5. A bill payable to order, drawn, accepted, and payable in England, is indorsed in France. The indorsement by the law of France gives no right to the indorsee to sue in his own name. The indorser (who is also drawer and payee) and the indorsee are, at the time the bill is made, subjects of and domiciled and resident in France. The indorsee can nevertheless maintain an action in England on the bill against the acceptor.¹

6. A bill drawn by *A*, an Englishman domiciled in England, on *X*, a Frenchman domiciled in France, is made payable in France, but is accepted by *X* in England. Whether *X*'s liabilities under the bill are governed by the law of England or by the law of France?²

- (3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.³

Comment.

The language of this sub-section is obscure. It should probably be construed *reddendo singula singulis*. The words "act is done" refer to presentment for acceptance or payment; the words "bill is dishonoured" refer to protest and notice of dishonour. As pointed out by Westlake,⁴ the word "act" presumably includes omission.

Illustrations.

1. *X* indorses to *A* in England a bill payable in Paris. *A* indorses it to a Frenchman, who on dishonour protests it, and transmits notice of protest to *X*, in accordance with French law. *A* can recover from *X* though he has not given him notice of dishonour according to English law.⁵

¹ *Lebel v. Tucker*, 1867, L. R. 3 Q. B. 77. This would appear to follow from the Bills of Exchange Act, 1882, s. 72, sub-s. (2), proviso. But the case, decided before the passing of the Act, depends on the principle that the contract of an acceptor who accepts in England is to pay an order valid by the law of England.

² See pp. 606, 607, *ante*.

³ Compare *Chalmers*, 4th ed., p. 243, and *Westlake*, 3rd ed., pp. 269, 270.

⁴ *Westlake*, 3rd ed., p. 270.

⁵ *Hirschfeld v. Smith*, 1866, L. R. 1 C. P. 340.

2. A bill is drawn in England payable in Spain. It is indorsed in England by *X* to *A*. *A* indorses it to *M*. It is dishonoured by non-acceptance, and twelve days afterwards *M* gives notice of this to *A*. *A* at once gives notice to *X*. By Spanish law, no notice of dishonour by non-acceptance is required. *A* can recover from *X*.¹

- (4) Where a bill is drawn out of, but payable in, the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts² at the place of payment on the day the bill is payable.³

Illustration.

A bill for 1,000 francs, payable three months after date, is drawn in France on London. The amount in English money the holder is entitled to receive is determined by the rate of exchange on the day the bill is payable.⁴

- (5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.⁵

Illustrations.

1. By English law, days of grace are allowed on bills payable after date. By French law, they are not. A bill drawn in Paris on London is entitled to three days of grace, whilst a bill drawn in London on Paris is not entitled to any days of grace.⁶

2. A bill is drawn in England payable in Paris three months after date. After it is drawn, but before it is due, a "moratory" law is passed in France, in consequence of war, postponing the

¹ *Horne v. Rouquette*, 1878, 3 Q. B. D. (C. A.) 514; *Chalmers*, 4th ed., p. 243.

² See Bills of Exchange Act, 1882, s. 10, and *Chalmers*, 4th ed., p. 29.

³ Bills of Exchange Act 1882, s. 72, sub-s. 4; *Chalmers*, 4th ed., p. 243.

⁴ *Chalmers*, 4th ed., p. 244.

⁵ Bills of Exchange Act, 1882, s. 72, sub-s. 5; *Chalmers*, 4th ed., p. 244.

⁶ *Chalmers*, 4th ed., p. 244.

maturity of all current bills for one month. The maturity of this bill is for all purposes to be determined by French law.¹

[RULE 161.—Bills of Exchange Act, 1882, s. 57.]
Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—

- (1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor, or from the drawer, or from a prior indorser,—
 - (a) The amount of the bill :
 - (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case :
 - (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.
- (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange, with interest thereon until the time of payment.²
- (3) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part; and where a bill is expressed to be payable with interest at a

¹ See *Chalmers*, 4th ed., p. 244; *Rouquette v. Overmann*, 1875, L. R. 10 Q. B. 525. See also, *Burrows v. Jemino*, 1726, 2 Str. 733.

² *Mellish v. Simeon*, 1794, 2 H. Bl. 378; *Suse v. Pompe*, 1860, 8 C. B. n. s. 538; *Willans v. Ayers*, 1877, 3 App. Cas. 133, 146.

given rate, interest as damages may or may not be given at the same rate as interest proper.¹

Comment.

The word "abroad" is not defined in the Bills of Exchange Act, 1882. It probably here means outside the British Islands, as the "British Islands" ² are defined in s. 4 of the Act.

The following points should be noted : —

First. When a bill, wherever drawn, is dishonoured within the British Islands, the measure of damages recoverable is to be determined in accordance with sub-section (1), and this sub-section refers exclusively to bills dishonoured at home.³ When a bill, wherever drawn, is dishonoured abroad, i. e., outside the British Islands, then the amount recoverable is the amount of the re-exchange, with interest thereon until the time of payment.

Secondly. "'Re-exchange,' in its usual application, means the "loss resulting from the dishonour of a bill in a country different "to that in which it was drawn or indorsed. The re-exchange is "ascertained by proof of the sum for which a sight bill (drawn at "the time and place of dishonour at the *then rate of exchange* "on the place where the drawer or indorser sought to be charged "resides) must be drawn in order to realise at the place of dishonour the amount of the dishonoured bill and the expenses consequent on its dishonour. The expenses consequent on dishonour are the expenses of protest, postage, customary commission, and brokerage, and, when a re-draft is drawn, the price of "the stamp."⁴

Thirdly. Section 57 (reproduced in Rule 161) determines most of the questions which can arise as to the damages recoverable on a dishonoured bill. The cases, therefore, decided before the Act came into force are for the most part useless. The principle which they on the whole suggest is, that "the place at which "each party to a bill or note undertakes that *he himself* will pay "it [*lex loci solutionis*] determines with regard to him the *lex*

¹ *Chalmers*, 4th ed., pp. 191-195. See as to how far damages are recoverable on a writ specially indorsed, *London &c. Bank v. Earl of Clancarty*, [1892] 1 Q. B. 689; *Dando v. Boden*, [1893] 1 Q. B. 318.

² For term "British Islands," see Rule 159, p. 600, *ante*.

³ *Ex parte Roberts*, 1886, 18 Q. B. D. (C. A.) 286, 292, *per Curiam*; *In re Commercial Bank of South Australia*, 1887, 36 Ch. D. 522, 527; and see *In re English Bank of the River Plate*, [1893] 2 Ch. 438.

⁴ *Chalmers*, 4th ed., pp. 193, 194. See further, the whole passage in *Chalmers* of which this is a part,

"*loci contractus* according to which his liability is governed;"¹ or, in other words, that the damages due from the party to a bill are determined by the proper law of his contract.² This rule is in conformity with the general principles as to the law governing liability under a contract,³ but cannot (it is submitted) be always acted upon in cases coming within s. 57. Thus, if *Y* draws a bill in France made payable and accepted by *X* in England, and indorses it to *A* in France, and the bill is dishonoured by *X* in England, the damages recoverable in an action in England by *A* against *Y* are to be determined by sub-s. 1, without any respect to the damages which may be recoverable against *Y* under the law of France.

Note, however, that the provisions of s. 57 are not exhaustive. Hence a foreign drawer of a bill accepted and dishonoured in England, who has paid re-exchange, may recover it from the English acceptor, and if he is liable for the re-exchange he may prove for it in bankruptcy against the acceptor's estate before the actual payment.⁴

Illustration.

X draws in England a bill on *M* at Vienna, payable there, for £750. *X* indorses the bill in England to *A*. *M* accepts the bill, but it is dishonoured. *A* is entitled to recover from *X* the re-exchange, i. e., the value of the foreign coin expressed in English money at the rate of exchange, with interest and expenses.⁵

Promissory Note.

[RULE 162.—Bills of Exchange Act, 1882, s. 83 (1).] A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a

¹ *Mayne, Damages*, 4th ed., cited *Chalmers*, 4th ed., 241.

² For the meaning of the term "proper law," see Rule 143, p. 540, *ante*.

³ *Ibid.*

⁴ *Ex parte Roberts*, 1886, 18 Q. B. D. (C. A.) 286.

The Bills of Exchange Act, 1882, does not deal with the law determining the validity and effect of a discharge from liability under a bill of exchange. This is regulated by the law in reference to discharge of contracts generally. See Rule 150, p. 575, *ante*, under which the validity and effect of a discharge depends, speaking generally, on the proper law of the contract. Compare, however, *Chalmers*, p. 242.

⁵ *Suse v. Pompe*, 1860, 8 C. B. N. s. 538; 30 L. J. C. P. 75.

sum certain in money to, or to the order of, a specified person or to bearer.¹

Illustrations.

1. An I. O. U. containing a promise to pay may constitute a note.²

The following are invalid as notes :—

2. "Borrowed of C £100 to account for on behalf of the X Club at — months' notice if required." (Signed) T. B.³

3. "I. O. U. £20 for value received." (Signed) W. B.⁴

4. "Nine years after date I promise to pay C £100, provided X shall not return to England, or his death be certified in the mean time." (Signed) W. B.⁵

[RULE 163. — Bills of Exchange Act, 1882, s. 89.]

(1) Subject to the provisions in this part [*i. e.*, Part IV.⁶ of the Bills of Exchange Act, 1882], and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(2) In applying those provisions, the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

(3) The following provisions as to bills do not apply to notes ; namely, provisions relating to —

(a) Presentment for acceptance ;

(b) Acceptance ;

(c) Acceptance *suprà* protest ;

(d) Bills in a set.

¹ *Chalmers*, 4th ed., p. 261.

This is the definition of a British note for other than stamp purposes, but it is not the definition of a foreign note. A foreign note must conform to foreign law in form, *i. e.*, to the law of the country where the note is made.

² *Brooks v. Elkins*, 1836, 2 M. & W. 74.

³ *White v. North*, 1849, 3 Ex. 689.

⁴ *Gould v. Coombs*, 1845, 1 C. B. 543.

⁵ *Morgan v. Jones*, 1830, 1 C. & J. 162. See *Chalmers*, 4th ed., p. 261.

⁶ Part IV. of the Bills of Exchange Act, 1882, ss. 83–89, refers to promissory notes.

- (4) Where a foreign note is dishonoured, protest thereof is unnecessary.

Comment.

The effect of this Rule, which reproduces the Bills of Exchange Act, 1882, s. 89, is that Rules 159 to 161,¹ reproducing parts of the Bills of Exchange Act, 1882, are applicable to promissory notes no less than to bills, subject to the general provisions of the Bills of Exchange Act, 1882, and the particular provisions of this Rule.

(G) FOREIGN NEGOTIABLE INSTRUMENTS.

RULE 164.²—A foreign instrument (*e. g.*, the bond of a foreign government) which is both

- (1) negotiable by the law of the country where it is issued, and
 - (2) negotiable by custom in England,
- is a negotiable instrument in England.³

Comment.

“A negotiable instrument payable to bearer is one which, by the custom of trade [or under statute], passes from hand to hand by delivery, and the holder of which for the time being, if he is a *bonâ fide* holder for value without notice, has a good title, notwithstanding any defect of title in the person from whom he took it.”⁴

The test of negotiability has been thus stated by Blackburn, J. : “It may therefore be laid down as a safe rule, that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a *negotiable instrument*, and the property in it passes to a *bonâ fide*

¹ See pp. 599–610, *ante*.

² *Gorgier v. Mievill*, 1824, 3 B. & C. 45; *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. (C. A.) 270; *Picker v. London & County Banking Co.* 1887, 18 Q. B. D. (C. A.) 515; *Goodwin v. Roberts*, 1876, 1 App. Cas. 476. See as to negotiable securities for money, *Chalmers*, 4th ed., pp. 312–327.

³ *Ibid*.

⁴ *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. (C. A.) 270, 294, *per Curiam*. The decision in this case is reversed, *London Joint Stock Bank v. Simmons*, [1892] A. C. 201, but the reversal does not affect the passage cited.

“transferee for value, though the transfer may not have taken place in market overt. But if either of the above requisites be wanting, *i. e.*, if it be either not accustomably transferable, or though it be accustomably transferable, yet if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a *negotiable instrument*; nor will delivery of it pass the property of it to a vendee, however *bonâ fide*, if the transferor himself have not a good title to it and the transfer be made out of market overt.”¹

Illustration.

The government of Prussia issues bonds whereby the King of Prussia declares himself and his successors bound for the amount of the bonds to every person who should for the time being be the holder of the bonds. Bonds of this description are, as a matter of custom, sold in the English market and passed from hand to hand like exchequer bills. Such bonds are negotiable instruments, and *A*, who *bonâ fide* without notice purchases in England such a bond from *N*, who has no title to it, has a good title to the bond.²

RULE 165.³ — A foreign instrument (*e. g.*, a bond of a foreign government) is not a negotiable instrument in England unless it fulfils the requirements of Rule 164.

Comment.

In order that a foreign instrument may be negotiable in England, it must fulfil two requirements.

In the first place, it must be strictly negotiable by the law of the country where it is issued; if not, there is no basis for maintaining that it is legally negotiable in England.⁴

¹ *Crouch v. Credit Foncier*, 1873, L. R. 8 Q. B. 374, 381, 382, per *Blackburn, J.*, citing notes to *Miller v. Race*, 1758, 1 Sm. L. Cas., 9th ed., p. 491. It is well pointed out (*Chalmers*, p. 313) that this statement requires two qualifications; for, first, an instrument may be made negotiable by statute, and, secondly, foreign government bonds may undoubtedly be negotiable, yet do not give the holder a right to sue the foreign government upon them in an English Court. See Rule 38, p. 209, *ante*.

² *Gorgier v. Mieville*, 1824, 3 B. & C. 45. See *Chalmers*, 4th ed., p. 314.

³ *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. (C. A.) 270; *Picker v. London & County Banking Co.* 1887, 18 Q. B. D. (C. A.) 515.

⁴ See *Picker v. London & County Banking Co.* 1887, 18 Q. B. D. (C. A.) 515, 517, judgment of *Esher, M. R.*

In the second place, it must be by the custom of merchants "negotiable" in the strictest sense in England. If a custom be not established,¹ or if all that be shown is that the right to sue on the instrument is transferred by delivery (assignability), then the instrument is not negotiable.

"A contractual document . . . may be such that, by virtue of its "delivery, all the rights of the transferor are transferred to, and "can be enforced by, the transferee against the original contract- "ing party; but it may yet fall short of being a completely nego- "tiable instrument, because the transferee acquires by mere deliv- "ery no better title than his transferor;"² in this case the instru- ment, whatever its character abroad, is not negotiable in England.

(H) INTEREST.

RULE 166.³ — The liability to pay interest, and the rate of interest payable in respect of a debt or loan, is determined by the proper law of the contract under which the debt is incurred or the loan is made.

Comment.

If interest is payable on a debt or loan, it must be so under the contract between the parties. Whatever law, therefore, governs the contract must determine all questions relating to interest. The law of the contract will indeed in general be the law of the country where the debt is to be paid or loan repaid. "The gen- "eral rule is, that interest is to be paid on contracts according to "the law of the place where they are to be performed; in all cases "where interest is expressly or impliedly to be paid. . . . Thus a "note made in Canada, where interest is six per cent., payable "with interest in England, where it is five per cent., bears English "interest only. Loans made in a place bear the interest of that "place, unless they are payable elsewhere. And, if payable in a

¹ *Picker v. London & County Banking Co.* 1887, 18 Q. B. D. (C. A.) 515, 517, judgment of *Esher*, M. R.; and see note 1, p. 615, *ante*.

² *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. (C. A.) 270, 294, *per Curiam*.

³ See *Nelson*, p. 279; *Story*, s. 291. Compare *Westlake*, p. 264; *Fergusson v. Fyffe*, 1841, 8 Cl. & F. 121, 140; *Arnott v. Redfern*, 1825, 2 C. & P. 88. See *Bar* (*Gillespie's transl.*, 2nd ed.), ss. 264-266, pp. 578-587, for statement of the different views maintained with reference to the laws governing the payment of interest, and note that the Scotch cases cited by *Gillespie*, pp. 585-587, support Rule 166. For the meaning of the term "proper law of the contract," see Rule 143, p. 540, *ante*.

"foreign country, they may bear any rate of interest not exceeding that which is lawful by the laws of that country."¹ But the reason why questions relating to interest are determined in general by the law of the place where the money owing or lent must be paid or repaid is that such law is in general the proper law of the contract. The principle to be kept in mind is, therefore, that interest is determined by the law governing the contract.²

Illustrations.

1. *X* borrows money from *A* in India. The loan is repayable in India. The loan bears Indian interest,³ i. e., whether and what interest is payable is determined, as far as it depends upon law, by the law of India.

2. In 1829 a bill of exchange is drawn and accepted in Paris, but made payable in England. No rate of interest is expressed to be payable on the bill. Default having been made in payment of the bill, the rate of interest payable is to be determined by English law.⁴

3. *X* agrees with *A* in London to pay *A* commission for services to be rendered by *A* in Scotland. A debt of £200 is due under the contract from *X* to *A*. Whether the debt carries interest is to be determined by the law of England (?).⁵

(I) CONTRACTS THROUGH AGENTS.

Contract of Agency.

RULE 167.⁶—An agent's authority, as between himself

¹ *Story*, s. 291.

² This is very well put by *Nelson*, p. 279. As to interest, see *Connor v. Bellamont*, 1742, 2 Atk. 382; *Stapleton v. Conway*, 1750, 3 Atk. 727; *Bodily v. Bellamy*, 1760, 2 Burr. 1094; *Dewar v. Span*, 1789, 3 T. R. 425; *Arnott v. Redfern*, 1825, 2 C. & P. 88; *Anon.* 1825, 3 Bing. 193; *Thompson v. Powles*, 1828, 2 Sim. 194.

³ Compare *Thompson v. Powles*, 1828, 2 Sim. 194, with *Fergusson v. Fyffe*, 1841, 8 Cl. & F. 121.

⁴ *Cooper v. Earl Waldegrave*, 1840, 2 Beav. 282. See *Chalmers*, 4th ed., p. 242, but compare Rule 160 (2), p. 605, *ante* (Bills of Exchange Act, 1882, s. 72), and Rule 161, p. 610, *ante* (Bills of Exchange Act, 1882, s. 57).

⁵ See *Arnott v. Redfern*, 1825, 2 C. & P. 88. Compare *Connor v. Bellamont*, 1742, 2 Atk. 382.

⁶ *Maspous v. Mildred*, 1882, 9 Q. B. D. (C. A.) 530, 539, judgment of *Lindley*, L. J. Compare *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q. B. (C. A.) 79, 83, judgment of *Esher*, M. R.

and his principal, is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created.

Comment.

If *P*, a principal, in Spain, constitutes *A* his agent, Spanish law is "a circumstance to be taken into account in considering "the nature and extent of the authority given by [*P* to *A*], but "the Spanish law is not . . . material for any other purpose."¹ If a principal, that is to say, in a particular country, there appoints an agent, it is to be presumed that the authority of the agent, as between him and the principal, is governed by the law of such country, *e. g.*, Spain. The contract of agency in short is like other contracts, governed by its proper law, which is in general the law of the place where the contract is made (*lex loci contractus*).²

Illustration.

P, a Spaniard, living in Spain, there constitutes *A* his agent for the sale of goods, under a document written in Spanish. The authority of *A*, as between *P* and *A*, must be determined in accordance with Spanish law.

Relation of Principal and Third Party.

RULE 168.³ — When a principal in one country contracts in another country through an agent, the rights and liabilities of the principal as regards third parties are, in general, governed by the law of such other country, *i. e.*, the country where the contract is made (*lex loci contractus*).

Comment.

"If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them."⁴

¹ *Maspons v. Mildred*, 1882, 9 Q. B. D. (C. A.) 530, 539, *per Curiam*.

² See pp. 569-571, *ante*.

³ See *Pattison v. Mills*, 1828, 1 Dow. & Cl. 342, 363. Compare Scotch case, *Delaurier v. Wyllie*, 1889, Ct. Sess. Rep., 4th ser., xvii., p. 191, for language of Lord *Kyllachy*.

⁴ *Pattison v. Mills*, 1828, 1 Dow. & Cl. 342, 363, *per Lyndhurst, Ch.*

These words contain a rough statement of the principle which determines the position of a principal in one country who, through an agent, makes contracts in another.

Hence ensues the consequence that if *P* in one country gives *A* a written authority in general terms to act for him as regards certain matters, *e. g.*, the sale and purchase of goods in different countries, *A* may be presumed to have in each country authority to act in accordance with the laws thereof, and in short to do any of the acts which an agent of his class may do under the law of such country.

If, for example, *P* in Brazil gives authority in general terms to *A*, under an instrument written in Portuguese, to act for him in different countries, then "if we find that the authority might be "carried out in England, or in France, or in any other country, "we come to the conclusion that it must have been intended that, "in any country where in fact it was to be carried out, that part "of it which was to be carried out in that country was to be carried out according to the law of that country. That would be "putting one construction only on the document [appointing the "agent], and not putting a different construction on it in different countries. The one meaning that [the principal] had was: "I give an authority which, if carried out in England, is to be "carried out according to the law of England; if in France, according to the law of France.' That is one meaning, though this "authority is to be applied in a different way in different places.

"If that is so, then the way to express that in the present case "is this. This authority was given in Brazil, and the meaning "is to be established by ascertaining what [*P*] meant when he "wrote it in Brazil. The authority being given in Brazil, and "being written in the Portuguese language, the intention of the "writer is to be ascertained by evidence of competent translators "and experts, including, if necessary, Brazilian lawyers, as to the "meaning of the language used; and if, according to such evidence, the intention appears to be that the authority shall be "acted upon in foreign countries, it follows that the extent of the "authority, in any country in which the authority is to be acted upon, is to be taken to be according to the law of the particular "country where it is acted upon." ¹

¹ *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q. B. (C. A.) 79, 83, 84, judgment of *Esher*, M. R. Conf. judgment of *Lindley*, L. J., p. 85. The reasoning of Lord *Esher* is (it is submitted) not quite satisfactory. If *P*, a Brazilian, appoints *A* to sell goods for *P* in England, and appoints him under a Brazilian document, it is no doubt reasonable to suppose that *P* employs *A*

In other words, *A* may be taken by third parties to have in England the authority which, under English law, belongs to agents of the same class as *A*.¹

Under our Rule, the rights and liabilities of a principal in a foreign country who contracts through an agent in England are governed by the law of England, and not by the law of the country, *e. g.*, France, where the principal resides. But our Rule does not in any way preclude the possibility that English law may contain special rules as to the legal position of a foreign principal.² So, again, if an English principal enters into a contract in a foreign country through an agent, his rights and liabilities under the contract are governed by the law of the foreign country, not of England; but it does not follow from this that, under the law of the foreign country, *e. g.*, France, the rights and liabilities of an English principal are the same as those of a French principal.

Illustrations.

1. *P* (principal), a merchant living in England, makes through *A* (agent) in Scotland a contract with *T* (third party) which is valid according to Scotch, but not according to English, law. The contract is governed by Scotch law.³

2. *P* in France, through *A* in England, engages *T* to serve *P* in London as a domestic servant. *P*'s rights and liabilities are governed by English law.

3. *P*, a Spaniard in Spain, through *A*, a Spaniard in England, effects an insurance with *T*, a London underwriter, on *P*'s ship. *P*'s name is not disclosed to *T*. *P*'s rights and liabilities are governed by English law.⁴

to act according to the law of England, *i. e.*, not to do anything forbidden by the law of England, and not to make arrangements which are invalid by the law of England; but can it necessarily be inferred that the extent of *A*'s authority as regards, at any rate, a third person who knows of the existence of the document appointing *A*, is to be measured by the law of England? The assumption is (it is submitted) equally reasonable that *A*'s authority is governed by Brazilian law, under which the appointment was made. Probably all that Lord *Esher*'s language means is that, where the terms of the instrument appointing *A* are general, he must be presumed to have the authority possessed by an agent of *A*'s class under English law.

¹ *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q. B. (C. A.) 79.

² See *Leake, Contracts*, 3rd ed., p. 420. See *Armstrong v. Stokes*, 1872, L. R. 7 Q. B. 598, 605.

³ *Pattison v. Mills*, 1828, 1 Dow. & Cl. 342.

⁴ See *Maspons v. Mildred*, 1882, 9 Q. B. D. (C. A.) 530, 541; *Maanes v. Henderson*, 1801, 1 East, 335.

4. *P*, a merchant of New Orleans, orders goods from *A*, a commission agent in England, who procures them from *T*, an English manufacturer. *P*'s rights and liabilities are governed by English law, and not by the law of Louisiana.¹

¹ *Armstrong v. Stokes*, 1872, L. R. 7 Q. B. 598, 605.

AMERICAN NOTES.

CHAPTER XXV.

PARTICULAR CONTRACTS.

1. (Rule 151.) CONTRACTS AS TO IMMOVABLES. — The question whether a covenant in a conveyance runs with the land is governed by the *lex situs*. *Fisher v. Parry*, 68 Ind. 465; *Riley v. Burroughs* (Neb.), 59 N. W. 929. Mortgages of land are governed by the *lex situs*. *Trust Co. v. Rathbun*, 5 Sawyer C. C. 32; *Dow v. R. R. Co.* 20 Fed. Rep. 260; *Fessenden v. Taft*, 65 N. H. 39; 17 Atl. 713; *Müller v. Shotwell*, 38 La. An. 890. See, however, *Gates v. Gaiher*, 46 La. An. 286; 15 So. 50. Personal covenants that do not attach to the soil are governed by the law of the place of contract. *Cochran v. Ward*, 5 Ind. App. 89; 29 N. E. 795, citing *Jackson v. Green*, 112 Ind. 341; *Worley v. Hineman*, 6 Ind. App. 240; 33 N. E. 260. Questions as to the recovery of rent under a lease are governed by the *lex situs*. *Stanton v. Harvey*, 44 La. An. 511; 10 So. 778. A contract relating to land may be construed and enforced according to another law than that of the *situs*, where it is made by persons domiciled elsewhere, and does not contravene the *lex situs*. *Bethel v. Bethel*, 54 Ind. 428; *Thurston v. Rosenfield*, 42 Mo. 474.

2. (Rule 152.) CONTRACTS AS TO MOVABLES. — Contracts relating to movables are generally governed by the *lex situs*. *Marvin Safe Co. v. Norton*, 48 N. J. L. 410; 57 Am. Rep. 566; *In re Kahn*, 55 Minn. 509; 57 N. W. 154; *Gross v. Jordan*, 83 Me. 380; 22 Atl. 250; *The Marina*, 19 Fed. Rep. 760. The effect of the indorsement and delivery in one State of a warehouse receipt for goods in another State is governed by the laws of the latter State. *Hallgarten v. Oldham*, 135 Mass. 1; 46 Am. Rep. 433. See also, *Sherley v. McCormick*, 135 Mass. 126. See, generally, as to movables, American Notes under chap. xxiii.

Chattel mortgages are governed by the *lex situs*. *Ames Iron Works v. Warren*, 76 Ind. 512; 40 Am. Rep. 258; *Clark v. Tarbell*, 58 N. H. 88; *Craig v. Williams* (Va.), 18 S. E. 899; *Pyeatt v. Powell*, 51 Fed. Rep. 551; 2 C. C. A. 367; 10 U. S. App. 200. A chattel mortgage valid by the law of the place where it was made, or by the law to which it is subject, will be enforced elsewhere. *Ramsey v. Glenn*, 33 Kan. 271; *Handley v. Harris* (Kan.), 29 Pac. 1145; *Stirk v. Hamilton*, 83 Me. 524; *Keenan v. Stimson*, 32 Minn. 377; *Clough v. Kyne*, 40 Ill. App. 234. An equitable lien on movables created by contract is enforceable wherever the equity jurisprudence of the United States prevails. *Riddle v. Hudgins*, 58 Fed. Rep. 490; 7 C. C. A. 335. A lien created by law for advances to a ship in a foreign port will be enforced. *The Maud Carter*, 29 Fed. Rep. 156. See also, *The Angela Maria*, 35 Fed. Rep. 430; *Baeder v. Carnie*, 44 N. J. L. 208. A lien on shares of stock, given to a corporation by the laws of the State of its creation, for a debt due from the

holder to the corporation, is a good defence to an action brought in another State by a person to whom the stock has been transferred. *Bishop v. Globe Co.* 135 Mass. 132. The question of a mechanics' lien is governed by the law of the place of the performance of the contract. *Thurman v. Kyle*, 71 Ga. 628; *Investment Co. v. Windmill Co.* 54 Kan. 144; 37 Pac. 982. See, however, *Campbell v. Coon*, 8 Misc. Rep. 234; 28 N. Y. Supp. 561.

3. (Rules 153-156.) CONTRACT OF AFFREIGHTMENT. — A bill of lading was issued by a steamship company at New York to an American shipper for the transportation of certain merchandise to England. The bill was signed by the ship's agent at New York; but though the line was English, there was no indication of the fact on the bill. The Court said that the general rule, "that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country. . . . The contract being made at New York, the shipowner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. . . . The fact that the goods are to be delivered at Liverpool, and the freight and primage, therefore, payable there in sterling currency, do not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage." *Liverpool Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 458, 459; *China Mut. Ins. Co. v. Force*, 142 N. Y. 90; 36 N. E. 874; *Brauer v. Compania Navigacion La Flecha*, 57 Fed. Rep. 403; 66 Fed. Rep. 776; *The Brantford City*, 29 Fed. Rep. 373; *Lazard v. Merchants' &c. Co.* 78 Md. 1; 26 Atl. 897. This rule applies, conversely, to contracts made in foreign ports, and containing stipulations limiting liability, which would be void on grounds of policy if the *lex fori* governed. *O'Reagan v. Cunard Steamship Co.* 160 Mass. 356; 35 N. E. 1070; *Fonseca v. Cunard Steamship Co.* 153 Mass. 553; 27 N. E. 665; *The Carib Prince*, 63 Fed. Rep. 266; *Potter v. The Majestic*, 60 Fed. Rep. 624; 9 C. C. A. 161; *The Titania*, 19 Fed. Rep. 101. It has been held that a clause providing for exemption from the consequences of negligence would not be enforced though the bill of lading contained the "flag clause," and, according to the law of the flag, the exemption was valid. *The Guildhall*, 58 Fed. Rep. 796; *Lewisohn v. National Steamship Co.* 56 Fed. Rep. 602. *Contra*, *The Oranmore*, 24 Fed. Rep. 922. This point has been reserved by higher courts in *Liverpool Steam Co. v. Phenix Ins. Co.* 129 U. S. 397; *The Guildhall*, 64 Fed. Rep. 867; *The Energia*, 66 Fed. Rep. 604. A stipulation in a bill of lading, for the shipment of merchandise on an English vessel from Brazil to New York, that all damage claims should be "settled direct with the owners according to English law, to the exclusion of proceedings in the courts of any other country," was held invalid as against the consignees. *The Etona*, 64 Fed. Rep. 880.

As to contracts with common carriers for the transportation of persons or goods from a place in one country or State to a place in another country or State, see American Notes, 7, under chap. xxiv.

An average adjustment, if the voyage is completed, is governed by the law of the port of destination; or, if the voyage is not completed, by the law of

the place where the voyage was broken up and a severance of interests occurred. *National Board of Marine Underwriters v. Melchers*, 45 Fed. Rep. 643; *Wharton, Conf. of L. ss. 443-445*.

4. (Rules 160, 161.) **BILLS OF EXCHANGE.** — (1) *Requisites in Form.* "As to the verbal form of bills, the rule *locus regit actum* prevails." *Wharton, Conf. of L. s. 448*. In *Scudder v. Union Nat. Bank*, 91 U. S. 106, referred to in the text, it was held that the form of the acceptance of a bill was governed by the law of the place where the contract of acceptance was made. In a recent case, a person who was engaged in business in Illinois made an oral agreement in Missouri to accept and pay at his place of business in Illinois all drafts drawn on him for live-stock to be shipped to him by the drawer from Missouri. By the laws of Missouri, such an agreement was required to be in writing; by the laws of Illinois, it was not. The Court held that the statute of Missouri could have "no application to an action brought to charge a person in Illinois upon a parol promise to accept and pay a bill of exchange payable in Illinois. The agreement to accept and pay, or to pay upon presentation, was to be entirely performed in Illinois, which was the State of the residence and place of business of the defendants. . . . Nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance. That law, consequently, must determine the rights of the parties." *Hall v. Cordell*, 142 U. S. 116; 12 Sup. Ct. 154.

(2) *Interpretation.* The engagement of each party who puts his name to negotiable paper, whether as principal or surety, "is governed by the law to which this particular engagement is subject." *Wharton, Conf. of L. s. 449*, and cases cited. The obligations of the acceptor of a bill of exchange are governed by the law of the place of payment. *Wharton, Conf. of L. s. 450*; *Sylvester v. Crohan*, 138 N. Y. 494. A draft drawn in Illinois, accepted wholly for accommodation in New York, and payable in New York, was returned to Illinois to be discounted. It was held that the liability of the acceptor to a *bonâ fide* holder for value, before maturity, was governed by the laws of Illinois. *Tilden v. Blair*, 21 Wall. 241, followed in *Farmers' Nat. Bank v. Sutton Mfg. Co.* 3 C. C. A. 1; 6 U. S. App. 312.

As to questions of demand, protest, dishonour, cumulation of expenses of exchange, etc., see *Wharton, Conf. of L. ss. 454, 455, 460*; also, *infra*, American Notes under Rule 162. See also, as to the interpretation and obligation of contracts, American notes, 7, under chap. xxiv. The statutes of a State regulating the damages upon protested paper have no extra-territorial operation. *Re Pulsifer*, 14 Fed. Rep. 247.

5. (Rules 162, 163.) **PROMISSORY NOTES.** — As to matters of form, see *supra*, 4. The liability of the maker of a promissory note is governed by the law of the place of payment. *Wharton, Conf. of L. s. 541*; *Stevens v. Gregg*, 89 Ky. 461; 12 S. W. 775; *Hefflebower v. Detrick*, 27 W. Va. 16; *Lowy v. Andreas*, 20 Ill. App. 521; *Woodsen v. Owens* (Miss.), 12 So. 207; *Fessenden v. Taft*, 65 N. H. 39. See *Joslin v. Miller*, 14 Neb. 91; *New England Mortgage Security Co. v. Vader*, 28 Fed. Rep. 265; *Bank of Edgefield v. Farmers' &c. Co.* 52 Fed. Rep. 98. A note is governed by the law of the place where it is made and is payable, *Sondheim v. Gilbert*, 117 Md. 71; *Stir v. Matthews*, 75 Mo. 96; *Gilman v. Stevens*, 63 N. H. 342; *Howard v. Fletcher*, 59 N. H. 151;

or where it is delivered and becomes effective. *Commercial Bank v. Simpson*, 90 N. C. 467; *Watson v. Lane*, 52 N. J. L. 550; 20 Atl. 894; *Barrett v. Dodge*, 16 R. I. 740; 19 Atl. 530; *Johnson v. Gawtry*, 83 Mo. 339. Where a note, in which no place of payment is specified, is dated and signed by one of its makers in one State, and is signed by the other maker and delivered in another State, it is governed by the laws of the latter State. *Hart v. Willis*, 52 Iowa, 56.

A note indorsed for accommodation is governed by the laws of the place where it is negotiated. *Briggs v. Latham*, 36 Kan. 255; *Stubbs v. Colt*, 30 Fed. Rep. 417; *Gay v. Rainey*, 89 Ill. 221; *Voigt v. Brown*, 42 Hun. 394. But where an accommodation note was made and was payable in New York, in which State the maker resided, and was, without his knowledge or consent, taken to Massachusetts and discounted at a rate of interest lawful there, but unlawful in New York, it was held that the note was governed by the laws of New York, the place of performance. *Dickinson v. Edwards*, 77 N. Y. 573, explained in *Wayne County Savings Bank v. Low*, 81 N. Y. 567.

The question whether, as between the indorser and his indorsee, an indorsement can be qualified by an oral agreement, is not a question of evidence to be determined by the *lex fori*, but a question of contract to be governed by the *lex loci contractus*. *Baxter Nat. Bank v. Talbot*, 154 Mass. 213; 28 N. E. 163.

Matters relating to protest, days of grace, notice of dishonour, and collection, are governed by the law of the place of payment. *Brown v. Jones*, 125 Ind. 375; 25 N. E. 452; *Tenant v. Tenant*, 110 Pa. St. 478; 1 Atl. 532; *Wooley v. Lyon*, 117 Ill. 244; 57 Am. Rep. 867; *Drake v. Found Treasure Min. Co.* 53 Fed. Rep. 474.

It has been held that the question whether a note is negotiable depends upon the law of the place where it was made. *Howenstein v. Barnes*, 5 Dillon C. C. 482.

6. (Rule 166.) INTEREST. — Interest is generally governed by the law of the place of performance of the contract. *Coghlan v. South Carolina R. R. Co.* 142 U. S. 101; 12 Sup. Ct. 150; *Sutro Tunnel Co. v. S. B. M. Co.* 19 Nev. 121; 7 Pac. 271; *Frierson v. Galbraith*, 12 Lea (Tenn.), 129; *Camp v. Randle*, 81 Ala. 240. See *Grant v. Healey*, 3 Sumner, 523; *Wells, Fargo & Co. v. Davis*, 105 N. Y. 670; *Consequa v. Fanning*, 13 Johns. Ch. 587; *Ballister v. Hamilton*, 3 La. An. 401; *Mills v. Wilson*, 88 Pa. St. 118.

As to usury, see American Notes, 6, under chap. xxiv.

7. (Rules 167, 168.) CONTRACTS THROUGH AGENTS. — A principal is considered as contracting where a duly authorised agent binds him. *Weil v. Golden*, 141 Mass. 364; *Hill v. Chase*, 143 Mass. 129; *Neuman v. Sheriff*, 43 La. An. 712. But if an agent merely has authority to receive orders, or enter into agreements, subject to the acceptance or ratification of his principal, the contract is made where such acceptance or ratification is given. *Mack v. Lee*, 13 R. I. 293; *Clafin & Co. v. Mayer*, 41 La. An. 1048; 7 So. 139; *Fuller v. Leet*, 59 N. H. 163; *Shuensfeldt v. Junkermann*, 20 Fed. Rep. 357; *Kerwin v. Doran*, 29 Mo. App. 397. See *Lewis v. McCabe*, 49 Conn. 141; *Wilson v. Lewiston Mill Co.* 74 Hun, 612; 26 N. Y. Supp. 847.

CHAPTER XXVI.

MARRIAGE.

(A) VALIDITY OF MARRIAGE.¹

RULE 169. — Subject to the exceptions hereinafter mentioned, a marriage is valid when

- (1) each² of the parties has, according to the law of his or her respective domicile, the capacity³ to marry the other, *and*,
- (2) any one of the following conditions as to the form⁴ of celebration is complied with (that is to say):
 - (i) if the marriage is celebrated in accordance with the local form;⁵ or,
 - (ii) if the parties enjoy the privilege of extritoriality, and the marriage is celebrated in accordance with any form recognised as valid by the law of the state⁶ to which they belong;⁷ or,

¹ *Savigny*, s. 379, p. 290; s. 381, pp. 318–325; *Westlake*, pp. 55–65; *Story*, ss. 79–81, 107–124 b; Foreign Marriage Act, 1892, 55 & 56 Vict. cap. 23.

² This Rule is only affirmative. It is possible that a marriage may be valid though the husband alone has capacity to marry according to his *lex domicilii*. *Sottomayor v. De Barros*, 1879, 5 P. D. 94. And see Rule 170, Exception 1, p. 646, *post*. Conf. as to capacity to contract, Rule 146, p. 543, *ante*.

³ *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1, compared with *Sottomayor v. De Barros*, 1879, 5 P. D. 94; *Mrs. Bulkley's Case*, in the French Courts, cited in note to *Pitt v. Pitt*, 1864, 4 Macq. 649; *Brook v. Brook*, 1861, 9 H. L. C. 193.

⁴ *Simonin v. Mallac*, 1860, 2 Sw. & Tr. 67, 29 L. J. (P. & M.) 97; *Dalrymple v. Dalrymple*, 1811, 2 Hagg. Cons. 54; *Scrimshire v. Scrimshire*, 1752, 2 Hagg. Cons. 395; *Herbert v. Herbert*, 1819, 2 Hagg. Cons. 263; *Smith v. Maxwell*, 1824, Ryan & Moody, 80; *Swift v. Kelly*, 1835, 3 Knapp, 257.

⁵ For meaning of "local form," see Rule 147 (1), p. 549, *ante*. The contract of marriage is obviously made in the country where the marriage is celebrated.

⁶ As to application of this sub-clause where a state consists of several countries, see p. 633, note 3, *post*.

⁷ *Pertreis v. Tondear*, 1790, 1 Hagg. Cons. 136; *Lautour v. Teesdale*, 1816,

- (iii) if the marriage [being between British subjects?] is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible;¹ or,
- (iv) if the marriage is celebrated in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892, s. 22, within the lines of a British Army serving abroad; or,
- (v) if the marriage, being between parties, one of whom at least is a British subject, is celebrated outside the United Kingdom in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892,² by or before a marriage officer³ (such, for example, as a British ambassador⁴ or British consul),⁵ within the meaning of, and duly authorised to be a marriage officer under, the said Act.⁶

In this Digest, the term "marriage" means the voluntary union for life of one man and one woman to the exclusion of all others.⁷

8 Taunt. 830; *Rez v. Brampton*, 1808, 10 East, 282. See also, *Marriage Commission Report*, p. 1.

¹ *Ruding v. Smith*, 1821, 2 Hagg. Cons. 371; *Cruise on Dignities*, 276; *Waldegrave Peerage Case*, 1837, 4 Cl. & F. 649; *Lloyd v. Petitjean*, 1839, 2 Curt. 251; *Este v. Smyth*, 1854, 18 Beav. 112; 23 L. J. Ch. 705.

² See the Foreign Marriage Act, 1892 (55 & 56 Vict. cap. 23), s. 1.

³ *Ibid.*, ss. 1, 11, 12.

⁴ *Ibid.*, s. 11, sub-s. 2 (a).

⁵ *Ibid.*, s. 11, sub-s. 2 (b).

⁶ *Ibid.*, ss. 11, 12. Note particularly that a marriage officer within this sub-clause must be authorised to be a marriage officer either under the warrant of a Secretary of State, termed a marriage warrant (*Ibid.*, s. 11, sub-s. (1) (a)), or under marriage regulations issued under the Foreign Marriage Act, 1892. *Ibid.*, s. 11, sub-s. (1) (b), and compare generally all the provisions of ss. 11, 12, 21.

⁷ For this definition of the term "marriage," see *Hyde v. Hyde*, 1867, L. R. 1 P. & D. 130; *Brinkley v. Attorney-General*, 1890, 15 P. D. 76.

Comment and Illustrations.

The validity of a marriage depends on the fulfilment of two conditions: first, on the *capacity* of the parties to marry each other; secondly, on the celebration of the marriage in due *form*: the word "form" includes all the formalities necessary to the validity of a marriage.

(1) *Capacity.*

The capacity of each of the parties to a marriage is to be judged of by their respective *lex domicilii*.¹ If they are each, whether belonging to the same country² or to different countries, capable according to their *lex domicilii* of marriage with the other, they have the capacity required by Rule 169, and their marriage is, as far as capacity is concerned, valid. In short, "as in other contracts, so in that of marriage, personal capacity must depend on the law of domicil."³

H, for example, marries *W*, his deceased wife's sister, in Massachusetts, where they are both domiciled. They are both American citizens, and under no incapacity, according to the law of their domicil, though they would, if domiciled in England, not be capable of marriage with each other. Their marriage is valid in England.⁴

H and *W* are Portuguese subjects, but domiciled in England. Being first cousins, they are, by the law of Portugal, incapable of contracting a valid marriage with each other. They are duly married in London, according to the forms required by English law. Their marriage is valid.⁵

(2) *Form.*

(i) *Local form.*⁶ A marriage celebrated in the mode, or according to the rites or ceremonies, held requisite by the law of the country where the marriage takes place,⁷ is (as far as formal

¹ See as to capacity to contract, Rule 146, p. 543, *ante*.

² For meaning of "country," see pp. 64, 66, *ante*.

³ *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1, 5, *per Curiam*.

⁴ See, further, comment on Rule 170, p. 642, *post*. In describing the two parties to a marriage, *H* is used to designate the husband, or intended husband; *W* the wife, or intended wife.

⁵ Compare *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1, with *Sottomayor v. De Barros*, 1879, 5 P. D. 94.

⁶ See sub-clause (i), p. 626, *ante*.

⁷ As to formal validity of contract, see Rule 147, p. 549, *ante*.

requisites go) valid. Our Courts in this matter give effect to the principle that the form of a contract is governed by the law of the place where the contract takes place, and hold that, though under certain circumstances other forms may be sufficient, yet that the local form always suffices, and that in general "the law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted."¹

In two respects, an extremely wide extension has been given to the principle contained in these words.

In the first place, the consents of parents or others, necessary by many laws to the validity of a marriage, are considered as part of the ceremony or form of the marriage.²

In the second place, the validity of a marriage is in no degree affected by the fact that the object of the parties in marrying away from their own country is to evade the requirements of the

¹ *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1, 5, *per Curiam*; *Simonin v. Mallac*, 1860, 2 Sw. & Tr. 67; 29 L. J. (P. & M.) 97.

² *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1, 7, *per Curiam*. This doctrine is now fully established by decided cases, but is logically open to criticism. A person who cannot marry without the consent of another is, *pro tanto*, under an incapacity, and, on the principle that capacity depends on the *lex domicilii*, the want of such consent ought to invalidate a marriage wherever it takes place.

The earlier English decisions did not distinguish between *capacity* and *form*, and brought both one and the other within the principle that the validity of a contract depends on the *lex loci contractus*. It was, therefore, laid down that the validity of a marriage celebrated in Scotland was to "be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of [a person's] marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." (*Dalrymple v. Dalrymple*, 1811, 2 Hagg. Cons. 54, 58, 59, *per Sir W. Scott*.) Hence the validity both of so-called Gretna Green marriages and of marriages in foreign countries, though purposely celebrated out of England to evade the requirements as to consents of the English marriage law, became firmly established by a series of cases, the effect of which could not be reversed except by legislation.

At a later period the Courts distinguished between capacity for marriage and the forms of marriage, holding that questions of capacity depended, in part at least, on the *lex domicilii*. (*Brook v. Brook*, 1861, 9 H. L. C. 193.) The decisions with respect to Scotch marriages could not then be reversed; and in order to reconcile them with the new distinction between capacity and form, the Courts were driven to adopt the logically very doubtful theory that the question of consent belongs to the marriage ceremony. See App., Note 2, *Preference of English Courts for lex loci contractus*.

law of their domicile as to consents, publicity, etc., or that no regular ceremony is required by the law of the country where the marriage takes place.¹

Hence, on the one hand, marriages between domiciled English persons, celebrated in a foreign country, are valid, if solemnised according to the forms required by the law of the country, *e. g.*, Scotland or France, where the marriage takes place;² and on the other hand, the marriage in England of foreigners, *e. g.*, French subjects domiciled in France, is, if duly celebrated according to the forms of English law, held valid here, even though it may be pronounced invalid by a French Court for want of the consents required by French law, or because the parties meant to evade the operation of French law.

H, an English infant domiciled in England, wishes to marry *W*, an Englishwoman. To evade the opposition of his guardians, *H* goes to Scotland, and resides there for four weeks.³ *W* then joins *H* in Scotland, and they are privately married there, *per verba de præsenti*, *i. e.*, by the mere statement in the presence of witnesses that they are man and wife. The marriage is valid.⁴

H and *W*, British subjects domiciled in England, and both of them infants, are privately married at Madrid by a Roman Catholic priest. The marriage, if valid by Spanish law, is valid here.⁵

H and *W* are French subjects domiciled in France. *H* cannot obtain his father's consent to the marriage. To avoid the necessity for such consent, *H* and *W* come to England, and are there married by license in accordance with English law. The marriage is invalid in France, for want of the due consents, but is held valid by our Courts.⁶

With reference to a case such as this, the Court of Appeal thus expressed itself:—

“The objection to the validity of the marriage in that case, which was solemnised in England, was the want of the consent of parents required by the law of France, but not, under the cir-

¹ *Dalrymple v. Dalrymple*, 1811, 2 Hagg. Cons. 54; *Scrimshire v. Scrimshire*, 1752, 2 Hagg. Cons. 395; *Swift v. Kelly*, 1835, 3 Knapp, 257; *Simonin v. Mallac*, 1860, 2 Sw. & Tr. 67; 29 L. J. (P. & M.) 97. See remarks of Lord Brougham in *Warrender v. Warrender*, 1835, 2 Cl. & F. 488, 548.

² *Ibid.* But see as to the kind of form required, *Burt v. Burt*, 1860, 2 Sw. & Tr. 88; *Reg. v. Allen*, 1872, L. R. 1 C. C. 367, 376, *per Curiam*.

³ Residence of one of the parties in Scotland for twenty-one days is now required under 19 & 20 Vict. cap. 96, s. 1.

⁴ *Dalrymple v. Dalrymple*, 1811, 2 Hagg. Cons. 54.

⁵ *Swift v. Kelly*, 1835, 3 Knapp, 257.

⁶ *Simonin v. Mallac*, 1860, 2 Sw. & Tr. 67, 29 L. J. (P. & M.) 97.

"cumstances, by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage." ¹

(ii) *Ex-territoriality*.²—The subjects of a state are, under certain circumstances, when in fact not residing within the limits of such state, considered by a fiction of law to be resident there, and to be subject to its laws. This fiction is termed *ex-territoriality*.³

The effect of ex-territoriality as regards marriage⁴ is, that where it applies a marriage is valid though not celebrated according to the ordinary local forms of the place of celebration, and is treated as though it had been in fact celebrated in the country in which it is supposed by a fiction of law to have been solemnised.

The principle of ex-territoriality applies to marriages celebrated in the mansion of an ambassador; to marriages celebrated at foreign factories and certain places, mainly found in the East, in which Europeans enjoy the privileges of ex-territoriality; and lastly to marriages celebrated on board ship.⁵

Marriages at Ambassador's.—The mansion of an ambassador is treated as part of the country which he represents. Hence marriages there by subjects of that country are good if celebrated according to forms held valid by its laws.

H and W, British subjects, are married, according to the rites of the Church of England, at the British Embassy at Paris. Their marriage is, independently of Acts of Parliament,⁶ valid in England, and would, it may be added, be held valid elsewhere.

¹ *Sottomayor v. De Barros*, 1877, 3 P. D. 1, 7, *per Curiam*.

The form need not necessarily be the form required by the *lex loci* in ordinary cases. All that is essential in order to bring a marriage within clause (i) is that it should be contracted in a form which, according to the law of the country where the marriage takes place, is sufficient under the circumstances of the particular case to constitute a valid marriage. Suppose, for example, that the law of France were that marriages between British subjects might be validly contracted in France if celebrated in accordance with the rites of the Church of England without any further ceremony. Then a marriage at Paris between *H* and *W*, British subjects, celebrated according to the rites of the Church of England, would be valid here as being celebrated according to the form required by the *lex loci contractus*.

² See sub-clause (ii), p. 626, *ante*.

³ See *Woolsey*, *International Law*, 3rd ed., s. 64.

⁴ *Pertre v. Tondear*, 1790, 1 Hagg. Cons. 136; *Lautour v. Teesdale*, 1816, 8 Taunt. 830; *Re v. Brampton*, 1808, 10 East, 282.

⁵ The application of the principle in the last case is somewhat different from its application in the first two cases.

⁶ See Rule 169, sub-clause (ii), p. 626, *ante*. Whether such a marriage is

H and *W*, Spanish subjects, are married according to Spanish forms at the Spanish Embassy in London. Their marriage is valid in England and elsewhere.

This privilege of ex-territoriality probably extends only to cases where *both parties* are subjects of the ambassador's sovereign. It certainly does not extend to cases where neither of the parties are his subjects.

The marriage between *H*, a foreigner, in the suite of the Spanish ambassador, and *W*, who was not a Bavarian subject, was celebrated at the chapel of the Bavarian ambassador in London. It was held invalid on the following grounds:—

“The party who proceeds was in the suite of the Spanish ambassador, and not of the Bavarian; and the other party, though she has the name of a foreigner, is not described as being of any ambassador's family, and has been resident in this country four months, which is much more than is necessary to constitute a matrimonial domicile in England, inasmuch as one month is sufficient for that under the Act of Parliament. Supposing the case, therefore, to be assimilated to that of a marriage abroad between persons of a different country, it is difficult to bring this marriage within the exception, as this woman is not described as domiciled in the family of the ambassador. Taking the privilege to exist in ambassadors' chapels (which has, perhaps, not been formally decided), I may still deem it a fit subject of consideration, whether such a privilege can protect a marriage where neither party, as far as appears at present, is of the country of the ambassador, and where one of them has acquired a matrimonial domicile in this country, and where it is not shown that she had been living in a house entitled to privilege during her residence in England. On these grounds I shall admit the libel. The matter may receive further illustration of facts which may entitle it to further consideration.”¹

Marriage at foreign factories.—It was at one time common in all lands, and is still common in the East, for the government of the country to allow to foreigners, at any rate within the limits of factories or trade settlements, the use of their own laws. In this case the factory is regarded as part of the country to which

now valid if it does not conform to the provisions of the Foreign Marriage Act, 1892 (55 & 56 Vict. cap. 23)? Semble, it is valid. See *Ibid.*, s. 23.

¹ *Pertreis v. Tondear*, 1790, 1 Hagg. Cons. 136, 138, 139, *per Curiam*. It may be assumed, though the point cannot be treated as judicially decided, that the privilege of ex-territoriality does not in England extend to any British subject. *Mar. Com. Rep.*, 1868, p. xxxviii.

it belongs, and persons marrying there may make a valid marriage by celebrating it according to the law of that country.

"In foreign countries, where either by express treaty or by the comity of nations the privilege of ex-territoriality has been enjoyed by British subjects within any defined limits, such as the factory of a trading company or the hotel of an ambassador, the marriage of a British subject, solemnised within such limits, according to the law of England, as it existed antecedent to the passing¹ of Lord Hardwicke's Act, has always been upheld by English Courts as a valid marriage."² The rule applied to the marriages of British subjects no doubt also applies to those of foreigners. *H* and *W*, for example, French subjects, marry at a French factory in Turkey, according to French forms. Their marriage will be held valid by English Courts.

Marriages on shipboard.—Any ship on the high seas, and a ship of war even when in a foreign port, is deemed part of the country to which the ship belongs. Marriages, therefore, on shipboard are in general valid, if good by the law of such country.³

¹ *I. e.*, marriage before an episcopally ordained clergyman, *e. g.*, a clergyman of the Church of England, a Roman Catholic priest, or a priest of the Greek Church. *Reg. v. Millis*, 1844, 10 Cl. & F. 534.

² *Marr. Comm. Rep.*, 1868, p. 1. Whether such a marriage is valid where it might be celebrated in accordance with the Marriage Act, 1890? Semble, it is valid. See Foreign Marriage Act, 1892, s. 23.

³ The application of the principle of ex-territoriality to the marriages of British subjects presents some difficulty, owing to the fact that they are citizens of a state which consists of different countries (see pp. 64, 66, *ante*). Hence the inquiry may be raised, what is the law by which a British subject, for instance, on board a British merchant ship on the high seas is governed, and by which the validity of his marriage on shipboard is to be determined? Is it the Common Law of England, or the Statute Law and Common Law combined, or the law of the country, *e. g.*, Scotland, where he is domiciled?

The answer to these and other questions of a like sort appears to be that, in the cases to which the principle of ex-territoriality applies, a British subject must be taken to be under the rule of the Common Law of England.

The correctness of this view, though open to question, appears to me confirmed by the principle that British subjects settling in a newly discovered country carry the law of England with them (1 *Blackstone*, pp. 107, 108); by the rules as to Anglo-Indian domicile (pp. 149–151, *ante*); and by the language of the Colonial Laws Validity Act, 1865 (28 & 29 Vict. cap. 63), s. 3.

The questions which may be raised as to the law which governs British subjects when on board a British ship may, of course, also be raised as to the law which governs them when they are within the limits of a British Embassy, or of a country where British subjects can claim the privilege of ex-territoriality; but marriages of British subjects in foreign countries are now to such a great extent regulated by the Foreign Marriage Act, 1892, that questions as to the validity of such marriages, independently of this Act, are unlikely to arise.

H and *W*, British subjects, marry on board a British merchant vessel on the high seas. The marriage service is performed by a Roman Catholic priest. The marriage, being good at common law, is valid.¹

(iii) *Use of the local form impossible*.²—Sub-clause (iii) applies to marriages in countries where it is strictly impossible for the parties to use a local form.

The impossibility may arise from the country being one where no local form of marriage recognised by civilised states exists, as where the marriage takes place in a land inhabited by savages, or it may arise from the form being one which it is morally or legally impossible for the parties to use. On this ground, a marriage between Protestants, celebrated at Rome by a Protestant clergyman, was admitted to be valid by Lord Eldon, on its being sworn that two Protestants could not there be married in accordance with the *lex loci*, as no Roman Catholic priest would be allowed to marry them.³ On the same ground, marriages in heathen or Mahommedan⁴ countries would be held valid, even though not in accordance with the local form. The validity, again, of marriages celebrated abroad, in accordance with the English common law,

H and *W*, Scotch persons domiciled in Scotland, contract marriage on board a British merchant ship on the high seas, *per verba de presenti*. No minister is present at the time of the making of the contract. The marriage is probably invalid. But it is possible that in such a case the validity of the marriage depends on the law of the country, viz., Scotland, where the parties are domiciled. Yet this does not meet the difficulty which may be raised where the respective domicils of the parties are different.

The difficulties which exist in applying the principle of ex-territoriality to the marriages of British subjects may exist in applying it to the marriages of persons belonging to other states, such as the Austro-Hungarian Empire, consisting of different countries with different marriage laws.

¹ *Reg. v. Millis*, 1844, 10 Cl. & F. 534. The validity of such a marriage is not (semble) in any way affected by the Foreign Marriage Act, 1892. The authority of *Reg. v. Millis* is, to a certain extent, doubtful. It has not been followed in the Canadian Courts, *Breakey v. Breakey*, 2 U. C. Q. B. 349, and it has been severely criticised in the Ecclesiastical Courts. *Catterall v. Catterall*, 1847, 1 Rob. Eco. 580. Conf. *Culling v. Culling*, [1896] P. 116.

It has not been followed in the United States. See especially, *Wharton*, 2nd ed., s. 172, note 1, where *Reg. v. Millis* is fully discussed and entirely disapproved of. It is, however, clearly binding on English Courts. Whether it is binding on Colonial Courts the appeal from which is to the Privy Council, not to the House of Lords?

² See sub-clause (iii), p. 627, *ante*.

³ *Cruise on Dignities*, p. 276; *Westlake*, 3rd ed., p. 60.

The Roman law was, as *Westlake* points out, incorrectly stated.

⁴ Supposing, of course, that the local marriage form involved ceremonies in which Christians could not take part.

within the lines of a British army, may possibly (independently of statutory enactments)¹ be placed on the ground of the impossibility of complying with the local form.

That sub-clause (iii) may apply, there must be an impossibility amounting to an insuperable difficulty² in complying with the local form. "Where persons [are] married abroad, it [is] necessary "to show that they were married according to the *lex loci*, or that "they could not avail themselves of the *lex loci*, or that there was "no *lex loci*."³ Mere difficulty in fulfilling the conditions imposed by the local law is not enough. Thus the fact that the law of a country does not allow persons to intermarry who have not resided there for six months does not enable British subjects who have resided there for a shorter period to make a valid marriage without complying with the requirements of the local law.⁴

The cases as to marriages held valid on account of the impossibility of complying with the local form are not numerous, and refer to the marriages of British subjects. It may, however, be assumed that, when compliance with the local form is impossible, our Courts will hold the marriages of foreigners valid at any rate if held good by the law of the country where the foreigners are domiciled. If, for example, *H* and *W*, Italian subjects domiciled in Italy, intermarry in China in accordance with a form held under the circumstances valid by the Italian tribunals, our Courts will probably hold the marriage good.⁵

Sub-clause (iii) applies, from its nature, only to marriages taking place beyond the limits of the British dominions.⁶

(iv) *Marriage within the lines of a British army*.⁷ — "It is "hereby declared that all marriages solemnised within the British "lines by any chaplain or officer, or other person officiating under "the orders of the commanding officer of a British army serving "abroad, shall be as valid in law as if the same had been solemnised within the United Kingdom, with a due observance of all "forms required by law."⁸

¹ See, however, the Foreign Marriage Act, 1892, s. 22.

² *Kent v. Burgess*, 1840, 11 Sim. 361, 376.

³ Per *Eldon*, C. ; *Cruise on Dignities*, p. 276.

⁴ *Kent v. Burgess*, 1840, 11 Sim. 361.

⁵ See 2 *Fraser, Husband and Wife*, 2nd ed., pp. 1313, 1314.

⁶ A marriage could never be valid under sub-clause (iii) if it came within sub-clause (v), i. e., could be celebrated under the Foreign Marriage Act, 1892, 55 & 56 Vict. cap. 23.

⁷ See sub-clause (iv), p. 627, *ante*.

⁸ Foreign Marriage Act, 1892, s. 22. See *Waldegrave Peerage Case*, 1837, 4 Cl. & F. 649, and compare 4 Geo. IV. cap. 91, which is now repealed.

This enactment, which in substance re-enacts part of 4 Geo. IV. cap. 91, s. 1, applies apparently not only to marriages where one of the parties is a British subject, but also to marriages between aliens. The marriage is valid whether the British army be or be not in hostile occupation of a foreign country,¹ and whether the chaplain, officer, or other person celebrating the marriage is authorised by the commanding officer to celebrate the particular marriage or not.²

(v) *Marriages*³ under the *Foreign Marriage Act, 1892*.⁴ — “All marriages between parties of whom one, at least, is a British subject, solemnised in the manner in this Act [Foreign Marriage Act, 1892] provided, in any foreign country or place, by or before a marriage officer within the meaning of this Act, shall be as valid in law as if the same had been solemnised in the United Kingdom with a due observance of all forms required by law.”⁵

These words give the effect of the *Foreign Marriage Act, 1892*. It provides modes in which (independently of the local form) a British subject may contract a valid marriage in a country outside the United Kingdom. The marriages to which it applies come in substance under four heads: —

(a) A marriage solemnised by or before a British ambassador⁶ residing in a foreign country to the government of which he is accredited at his official residence.

(b) A marriage solemnised by or before a British consul at his official residence.⁷

(c) A marriage solemnised on board one of Her Majesty's ships on a foreign station by or before the commanding officer thereof.⁸

(d) A marriage solemnised by or before a Governor, high commissioner, resident, consular, or other officer, at his official residence.⁹

¹ *Waldegrave Peerage Case*, 1837, 4 Cl. & F. 649.

² *Ibid.*

³ *I. e.*, other than a marriage within the lines of a British army.

⁴ 55 & 56 Vict. cap. 23.

⁵ *Foreign Marriage Act, 1892*, s. 1.

⁶ Or any officer prescribed as an officer for solemnising marriages in the official house of such ambassador. Compare *Foreign Marriage Act, 1892*, ss. 1, 8, 11, sub-ss. (1) (a) and (b), and (2) (a).

⁷ *Ibid.*, ss. 1, 8, 11, sub-s. 2 (b).

⁸ *Ibid.*, s. 12.

⁹ *Ibid.*, ss. 1, 8, 11, sub-s. 2 (c).

The marriages under heads (a), (b), and (c) ¹ must, apparently, be solemnised outside the British dominions. A marriage under head (d), *e. g.*, by a Governor, may be solemnised at a place within the British dominions.²

For all details, the reader should consult the Foreign Marriage Act, 1892, but the following general points deserve notice:—

First. A marriage duly solemnised under the Foreign Marriage Act, 1892, is valid as regards form even though the local form be not observed.

Secondly. The Foreign Marriage Act, 1892, has no bearing upon the capacity of the parties to intermarry. A marriage solemnised under that Act, *e. g.*, at a British consul's, is "as valid in law as if the same had been solemnised in the United Kingdom, with a due observance of all forms required by law," but a marriage so solemnised in the United Kingdom may be invalid if the parties are incapable of intermarriage under the law of their domicile.³ Hence a marriage, *e. g.*, before a British consul, would also be invalid if the parties were under an incapacity to intermarry by the law of their domicile.

Thirdly. A marriage under the Foreign Marriage Act, 1892, is subject to the provisions of the Act as to the authority of the marriage officer by or before whom the marriage is celebrated, as to the due observance of the required formalities, and the like.⁴ And generally the right to solemnise, and the solemnisation of any marriage within the Act, is subject to "marriage regulations," to be made by order in council.⁵

Upon these regulations, which may be made either generally or with reference to any particular case, or class of cases,⁶ depends to a great extent the operation of the Act.

Fourthly. It is an aim of the Act to prevent conflicts of law.

Marriage regulations may prohibit or restrict the exercise by marriage officers of their powers under the Act "where the exercise of those powers appears to Her Majesty to be inconsistent with international law or the comity of nations."⁷

¹ One of Her Majesty's ships is indeed technically part of the British dominions (see pp. 65, 68, *ante*), but the Foreign Marriage Act, 1892, s. 12, applies to such a ship only when "on a foreign station."

² *Ibid.*, s. 11, sub-s. 2 (c).

³ *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1. See Rule 169, p. 626, *ante*, and Rule 170, p. 642, *post*.

⁴ Foreign Marriage Act, 1892, ss. 12-16.

⁵ *Ibid.*, s. 21.

⁶ *Ibid.*, s. 21, sub-s. 2.

⁷ *Ibid.*, s. 21, sub-s. 1 (a).

Exception 1. — A marriage is not valid which is incestuous by the laws of all Christian countries.¹

Comment.

A marriage held to be incestuous by the whole Christian world, *e. g.*, a marriage between a brother and a sister, is, wherever celebrated, invalid by the law of England.

Such a marriage is invalid here, wherever it be celebrated, and whoever may be the parties to it. It is invalid, not, in strictness, because it is prohibited by some supposed common law of Christendom, but because it is prohibited by English law on the ground of its being incestuous, whence the inference may be drawn that our Courts are forbidden in all cases to recognise such a marriage, without any reference to the place of celebration, or to the allegiance or to the domicile of the parties.²

Exception 2. — A marriage is not valid if either of the parties, being a descendant of George II., marries in contravention of the Royal Marriage Act, 12 Geo. III. cap. 11.

Comment.

The Royal Marriage Act enacts in substance that, subject to certain exceptions³ and limitations, no descendant of George II. shall be capable of contracting matrimony without the previous consent of the sovereign signified in the manner provided by the Act, and that any marriage of such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever.

H, a descendant of George II., married *W* at Rome, in accord-

¹ See *Story*, ss. 113 *a*, 114.

² In other words, the motive or ground for prohibiting a marriage may be a guide in deciding what are the marriages and who are the persons intended by the legislature to be affected by the prohibition. Thus, if an Act of Parliament were to prohibit the marriage of first cousins, the Courts would probably hold that the ground of such a prohibition was not the immorality but the inexpediency of such a marriage, and would therefore draw the inference that the Act had no application to foreigners domiciled out of England. On the other hand, the suggestion has been made that the marriage between an uncle and a niece is prohibited as immoral, and therefore would, under no circumstances whatever, be recognised by our Courts. (*Warrender v. Warrender*, 1835, 2 Cl. & F. 488, 531.) The doubts, again, which may exist as to the limits within which English law refuses recognition to the marriage with a deceased wife's sister, depend at bottom on the different views which may be entertained as to the real ground or motive for the prohibition of such a marriage.

³ See especially, *s. 2*, as to marriage of descendant of George the Second, when above 25 years of age.

ance with the form required by the *lex loci*, without having obtained the consent required by the Act. He was, however, under no disability, either by English or by Roman law, except that which might arise from the contravention of the Royal Marriage Act. His marriage was held by our Courts to be absolutely void.¹

The Act, and the case decided under it, give rise to two remarks:—

First. Though *H* was in fact domiciled in England, and a British subject, his marriage would, in all probability, have been held invalid had he been domiciled at Rome, and probably even had he been an alien. The Act appears intended to apply to all the descendants (with a limited exception)² of George II.; and if this be the intention of the legislature, all Courts throughout the British dominions must, of course, give effect to it, whatever be the domicile or the allegiance of the persons affected by the Act.

Secondly. It is probable that foreign Courts would not give effect to the provisions of the Royal Marriage Act in the case of persons not domiciled in England, and that our Courts, on the other hand, would refuse to give effect to a similar law passed, *e. g.*, by the Italian Parliament, in the case of a person not domiciled in Italy. The incapacity, in short, produced by such a law would be regarded as constituting a privative status, which was not entitled to recognition by the Courts of any state except the state where the law was in force.³

Exception 3.—A marriage is, possibly, not valid if *either* of the parties is, according to the law of the country where the marriage is *celebrated*, under an incapacity to marry the other.⁴

¹ *Sussex Peerage Case*, 1844, 11 Cl. & F. 85.

² *Viz.*, the issue of Princesses marrying into foreign families. It is from this exception that the inference may be drawn that the Act applies to descendants of George II., who may not be British subjects.

³ See Rule 122, p. 474, *ante*.

⁴ "It is . . . indispensable to the validity of a marriage that the *lex loci actus* be satisfied so far as regards the capacity of the parties to contract it, "whether in respect of the prohibited degrees of affinity, or in respect of any "other cause of incapacity, absolute or relative." *Westlake*, 3rd ed., p. 56, citing *Scrimshire v. Scrimshire*, 1752, 2 Hagg. Cons. 395; *Middleton v. Janverin*, 1802, 2 Hagg. Cons. 437; *Dalrymple v. Dalrymple*, 1811, 2 Hagg. Cons. 54. The weight due to Mr. Westlake's high authority necessitates the insertion of this exception. Its soundness, however, is doubtful. The cases he cites are consistent with his doctrine, but do not necessitate its adoption.

Illustrations.

1. *H* and *W* are citizens of Massachusetts, and *W* is the sister of *H*'s deceased wife. *H* marries *W* in a church in London, in accordance with all the formalities required by English law. According to the law of Massachusetts, marriage with a deceased wife's sister is legal. The marriage of *H* and *W* is (possibly) not valid.

2. *H* and *W*, his first cousin, are British subjects domiciled in England. While travelling in Portugal, where first cousins are legally incapable of marrying one another,¹ they are married in a Portuguese church, in accordance with the formalities required by Portuguese law. The marriage is (possibly) not valid.

3. The case is the same as case 2, except that *H* and *W* are married, not in a Portuguese church, but at an English consulate in Lisbon, in accordance with the provisions of the Foreign Marriage Act, 1892. The marriage is (possibly) not valid.

H and *W*, British subjects domiciled in England, are first cousins; they are married at the British embassy in Portugal, in accordance with the requirements of the Foreign Marriage Act, 1892. Their marriage is valid.²

RULE 170. — Subject to the exceptions hereinafter mentioned, no marriage is valid which does not comply, both as to the capacity³ of the parties and the form⁴ of celebration, with Rule 169.

Comment and Illustrations.

(1) *Want of Capacity.*

Capacity to marry⁵ depends upon the law of a person's domicil.

¹ *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1.

² *I. e.*, in England. Compare *Sottomayor v. De Barros*, 1879, 5 P. D. 94.

Exception 3 has, it is submitted, no application to a case where the parties to a marriage can claim the benefit of ex-territoriality.

³ *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1, 5; *Brook v. Brook*, 1861, 9 H. L. C. 193, 234, 235.

⁴ *Kent v. Burgess*, 1840, 11 Sim. 361; *In re Estate of McLoughlin*, 1878, 1 L. R. Ir. (Ch.) 421; *Lacon v. Higgins*, 1822, 3 Stark, 178; *Butler v. Freeman*, 1756, Amb. 301; *Swift v. Kelly*, 1835, 3 Knapp, 257; *Westlake*, p. 55; *Story*, s. 113.

⁵ See p. 543, *ante*.

"It is a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicile. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnised is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnised must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both, at the time of their marriage, subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnised."¹

"The learned judge,² [said Lord St. Leonards] . . . came to the conclusion, after an elaborate review of the authorities, that a marriage contracted by the subjects of one country, in which they are domiciled, in another country, is not to be held valid if, by contracting it, the laws of their own country are violated. This proposition is more extensive than the case before us requires us to act upon, but I do not dissent from it."³

The principle that legal capacity to marry depends upon a person's *lex domicilii* may be applied by our Courts either to marriages prohibited by English law and celebrated in a foreign country, or to marriages prohibited by a foreign law and celebrated in England.

Marriages prohibited by English law. — A marriage with his deceased wife's sister by a *widower domiciled in England* is, under this principle, invalid wherever celebrated. Thus *H*, a German naturalized and domiciled in England, married *W*, also a German, and his deceased wife's sister by the half blood, at Frankfort, where she was domiciled, and such marriage was legal. He then returned to England, and continued to reside there till

¹ *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1, 5, *per Curiam*.

² *Sir Cresswell Cresswell*.

³ *Brook v. Brook*, 1861, 9 H. L. C. 193, 234, 235, *per Lord St. Leonards*.

his death. It was held here that *H* was under a disability to marry *W*, and that the disability of either party invalidated the marriage.¹ So, again, where *H*, a widower, and *W*, his deceased wife's sister, both being domiciled in England, went for a short time to Denmark and were there married, our Courts held that such a marriage, even though in accordance with the law of Denmark, was invalid,² and all attempts to evade the law of England, by marrying in a country where marriages with a deceased wife's sister are lawful, have utterly failed in obtaining any sanction for such marriages from our Courts. The grounds for such failure have been thus stated:—

“It is quite obvious that no civilised state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion or morality, or to any of its fundamental institutions.

“A marriage between a man and the sister of his deceased wife, being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so, even if they were native-born English subjects, who had abandoned their English domicile, and were domiciled in Denmark. But I am by no means prepared to say that the marriage now in question ought to be, or would be, held valid in the Danish Courts, proof being given that the parties were British subjects domiciled in England at the time of the marriage, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of God. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined.”³

The principle applied by our Courts to marriage with a deceased

¹ *Mette v. Mette*, 1859, 1 Sw. & Tr. 416; 28 L. J. (P. & M.) 117. There is no doubt that stress was in this case laid on *H* being a British subject, but this was immaterial, *H*'s *lex domicilii* being sufficient to invalidate the marriage. As to futile attempts to treat such a marriage as for some purposes valid, see *Pawson v. Brown*, 1879, 13 Ch. D. 202; *Ayerst v. Jenkins*, 1873, L. R. 16 Eq. 275; *Howarth v. Mills*, 1866, L. R. 2 Eq. 389.

² *Brook v. Brook*, 1861, 9 H. L. C. 193. See, as to Scotch law, *Fenton v. Livingstone*, 1859, 3 Macq. 497.

³ *Brook v. Brook*, 1861, 9 H. L. C. 193, 212, 213, per *Campbell*, C.

wife's sister will be applied by them to any other marriage by a person domiciled in England which comes within the prohibited degrees, such as a marriage by an uncle with a niece.¹

Marriages prohibited by foreign law. — A marriage prohibited by the law of the country where both the parties are domiciled, and celebrated here, is, though legal by the ordinary rules of English law, invalid in England.

H and W, Portuguese subjects domiciled in Portugal, were first cousins, and on that account incapable by the law of Portugal of intermarrying with each other without the dispensation of the Pope. While residing in England, but not domiciled there, they were married according to the forms required by English law. The marriage was held invalid by our Courts.²

Though in the judgment of the Court stress is laid on the marriage being by Portuguese law "incestuous," and on the fact that the parties were Portuguese "subjects," these matters are almost certainly immaterial. The true *ratio decidendi* is, that "the question of personal capacity to enter into any contract is "to be decided by the law of domicile."³

¹ English Courts will, of course, hold invalid a marriage by any person who is prohibited from entering into it by English law. There is, further, no doubt that marriage with a deceased wife's sister is prohibited by English law. The question, however, who are the persons to whom this prohibition is intended to apply, admits of controversy, and in fact three different views have been taken as to the answer to be given to it.

First. The prohibition has been thought to apply to all persons whomsoever, whether British subjects or aliens. This is the natural view of those who hold that English law treats the marriage in question as strictly incestuous. *Brook v. Brook*, 1861, 9 H. L. C. 193, 230, 234, language of Lord *St. Leonards*.

Secondly. The prohibition has been held to apply to all British subjects and to all persons domiciled in England. This was, perhaps, the view of the Court which gave judgment in *Mette v. Mette*, 1859, 1 Sw. & Tr. 416; 28 L. J. (P. & M.) 117.

Thirdly. The prohibition may be considered to apply to all persons, whether British subjects or aliens, domiciled in England, and to such persons only. This, on the whole, would seem to have been the view of the House of Lords when giving judgment in *Brook v. Brook*, 1861, 9 H. L. C. 193 (see especially, language of *Campbell, C.*, pp. 212, 213, and of Lord *Cranworth*, pp. 226-228), and is (it is conceived) the sounder view. It is in conformity with *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1, and is reconcilable with the colonial Acts making the marriages in question legal in the colonies.

² *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1.

³ *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1, 5, *per Curiam*.

(2) *Want of Form.*

No marriage is valid which, in respect of form (including in that term all the formalities, rites, and ceremonies of marriage), does not fall within the terms of Rule 169.¹

The following are examples of marriages which are invalid on account of not fulfilling the conditions as to form of Rule 169:—

In 1838² *H* and *W*, English persons domiciled in England, are married at the English church at Antwerp by a clergyman of the Church of England, in the presence of the English consul. Formalities required in respect of residence and otherwise by Belgian law are omitted. The marriage is invalid.³

In 1833 *H* and *W*, Irish persons domiciled in Ireland, go in England through a ceremony of marriage celebrated by a Roman Catholic priest. The marriage is invalid.⁴

H and *W*, persons domiciled in Scotland, marry in England by acknowledging themselves to be man and wife in the presence of third parties. The marriage is invalid.⁵

H, a Frenchman, marries *W*, an Englishwoman and British subject, at the chapel of the French embassy, without complying with the requirements of English law as to banns, license, etc. The marriage is invalid.⁶

Exception 1.—A marriage celebrated in England is, possibly, not rendered invalid by the incapacity of the wife according to the law of her domicile to marry the husband, if the husband, being domiciled in England, is by English law under no incapacity to marry the wife.⁷

Comment.

From the principle that capacity depends on the law of a person's domicile, it would seem to follow that the disability of either party,⁸ under the law of his or her domicile, to contract a marriage with the other, invalidates the marriage. A suggestion has, however, been judicially made that the application of the principle

¹ See pp. 626, 627, *ante*.

² And therefore prior to the Foreign Marriage Act, 1849, 12 & 13 Vict. cap. 68.

³ *Kent v. Burgess*, 1840, 11 Sim. 361. Compare *Catherwood v. Caslon*, 1844, 13 M. & W. 261; 13 L. J. Ex. 334.

⁴ *In re Estate of McLoughlin*, 1878, 1 L. R. Ir. (Ch.) 421. In each of the foregoing cases the marriage, but for its not conforming to the *lex loci contractus*, would be valid by the English common law.

⁵ It would be held invalid in Scotland as well as in England. 2 *Fraser, Husband and Wife*, 2nd ed., 1309, 1310.

⁶ Compare *Pertries v. Tondear*, 1790, 1 Hagg. Cons. 136.

⁷ See *Sottomayor v. De Barros*, 1879, 5 P. D. 94.

⁸ See *Mette v. Mette*, 1859, 1 Sw. & Tr. 416; 28 L. J. (P. & M.) 117.

should be limited to cases in which both of the parties are domiciled in a country by the laws of which they are incapable of intermarriage.

"Our opinion [that parties cannot make a valid marriage who are under an incapacity by their *lex domicilii*] . . . is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country the laws of which prohibit their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognise the laws of a foreign state when they work injustice to its own subjects, and this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognised by the law of this country."¹

The suggested limitation has been acted upon in one case to the extent stated in the Exception, and must, provisionally at least, be assumed, in spite of its illogical character, to be good law.

H and *W* are first cousins. *H* is domiciled in England. *W*, the woman, is domiciled in Portugal, and is, under the law of her Portuguese domicil, incapable of marrying *H*. They marry in England. The marriage, *semble*, is valid.²

*Exception 2.*³—A marriage celebrated in England is not invalid on account of any incapacity of either of the parties which, though imposed by the law of his or her domicil, is of a kind to which our Courts refuse recognition.

Comment.

H, a negro, domiciled in a country where marriages between whites and negroes are prohibited, and *W*, a white woman, also there domiciled, come to England, and, without having acquired an English domicil, are married here. The marriage is valid.⁴

¹ *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1, 6, 7, *per Curiam*.

Savigny, however, holds that an incapacity affecting a future wife according to the law of her domicil, but not affecting the future husband according to the law of his domicil, is immaterial. Hence, though he would approve of the decision in *Mette v. Mette*, he would hold that, if in that case the husband had been domiciled in Germany whilst the wife had been domiciled in England, the marriage ought to have been held valid by our Courts. See *Savigny*, s. 379, pp. 291, 292.

² *Sottomayor v. De Barros*, 1879, 5 P. D. 94. See, however, Mr. Westlake's cogent criticism on the judgment in *Sottomayor v. De Barros*, 1879, 5 P. D. 94; *Westlake*, pp. 57, 58.

³ See Rule 122, p. 474, *ante*.

⁴ "It has been decided that State laws forbidding the intermarriage of whites

So the marriage of a monk or a nun would be held valid here, even though he or she might be incapable of marriage by the law of his or her domicile.¹

Exception 3. — Any marriage is valid which is made valid by Act of Parliament.²

Comment.

Acts are often passed rendering valid³ marriages, or, rather, attempted marriages, which are invalid on account of the omission of some necessary formality. Such marriages are, of course, valid throughout the British dominions.⁴

(B) ASSIGNMENT OF MOVABLES IN CONSEQUENCE OF MARRIAGE.⁵

RULE 171.⁶ — Where there is no marriage contract or settlement, the mutual rights of husband and wife to each other's movables, whether possessed at the time of the mar-

"and blacks are such police regulations as are entirely within the power of the States, notwithstanding the provisions of the new amendments to the Federal Constitution." *Cooley, Constitutional Limitations*, 6th ed., 1890, p. 481, note 1.

¹ See *Coke Litt.*, p. 136 a; 2 *Coke Inst.*, p. 687. See as to the principle of this exception, Intro., General Principle II. (B), p. 32, *ante*, and Rule 122, p. 474, *ante*.

² See Intro., General Principle II. (A), p. 32, *ante*, and Rule 144, p. 541, *ante*.

³ See, for example, the Marriage Validation Act, 1888, 51 & 52 Vict. cap. 28.

⁴ *Question.* — Can a marriage be valid where the requirements of Rule 169, as to form are of necessity neglected? (Compare pp. 634, 635, *ante*).

H and W, an Englishman and an Englishwoman domiciled in England, are passengers on board a British ship. The ship is wrecked on a desert island. The crew and the passengers are saved, but have no means of leaving the island. *H* and *W* wish to marry. There is no local form of marriage to follow. There is no minister in holy orders among the shipwrecked persons. *H* and *W* marry *per verba de presenti*, in the presence of their companions. Is such a marriage valid? Semble, it is not; the invalidity, however, arises wholly from the strict application of *Reg. v. Millis*, 1844, 10 Cl. & F. 534. But for this case the marriage might be good at common law and valid; nor is it quite certain that in the absence of any possibility of compliance either with the local form or with the common law, the marriage might not be held valid within the principle suggested by *Ruding v. Smith*, 1821, 2 Hagg. Cons. 371.

⁵ *Story*, ss. 143-199; *Foote*, 2nd ed., pp. 315-321; *Westlake*, 3rd ed., pp. 65-74; 35-38; *Savigny*, s. 379, pp. 292-298; *Bar* (*Gillespie's transl.*) pp. 405-427. The effect of marriage on immovables is governed by the *lex situs*. See Rule 138, p. 516, *ante*, and p. 519, *ante*.

⁶ *Stein's Case*, 1813, 1 Rose, 462, 481; *Selkirk v. Davis*, 1814, 2 Rose, 291; *Story*, ss. 184-199; *Westlake*, p. 68.

riage or acquired afterwards, are (subject to the possible exception hereinafter mentioned) governed by the law of the husband's actual [or intended?] domicile at the time of the marriage, without reference to the law of the country

(1) where the marriage is celebrated, or

(2) where the wife is domiciled before marriage.

The husband's actual [or intended?] domicile at the time of the marriage is hereinafter termed "the matrimonial domicile."

Comment.

This Rule may be considered well established. No English decision can, it is true, be cited which directly establishes it. It is, however, in harmony with the tendency of decided cases, is not opposed to any doctrine judicially laid down, and commands the general¹ consent of jurists.

The term "matrimonial domicile"² used in the Rule means in general the actual domicile of the husband at the time of the marriage; but it may possibly, when persons marry with the avowed intention of immediately settling in some country where the husband is not actually domiciled, mean not the actual but the intended domicile of the husband.³ Even though some little doubt may be entertained whether our Courts will ever look to the intended, rather than the actual, domicile of the husband, as determining the law which regulates the rights of the parties to a marriage in respect of movables, there can, it is conceived, be no doubt that English tribunals will not hold that these rights are to be determined with reference either to the law of the country where the marriage is celebrated,⁴ or to the law of the country where the wife was domiciled immediately before marriage.

¹ *Story*, ss. 158, 159, appears to suggest that the effect of a marriage on property depends on the law of the place where the marriage is celebrated. This view, which is not countenanced by other writers, is hardly consistent with the language which he uses in ss. 186, 187. The expressions employed in ss. 158, 159, refer, it may be assumed, to cases in which the place where the marriage is celebrated is also the place of the matrimonial domicile.

² "By the 'matrimonial' domicile is to be understood that of the husband at the date of the marriage, with a possible exception in favour of any other which may have been acquired immediately after the marriage, in pursuance of an agreement to that effect made before it." *Westlake*, 3rd ed., p. 68.

³ See 1 *Bishop, Marriage and Divorce*, 5th ed., s. 404.

⁴ There are expressions to be found of *Grove, J.*, in *De Greuchy v. Wills*, 1879, 4 C. P. D. 362, 364, which appear to imply that the husband's liability to pay ante-nuptial debts of the wife may depend on the law of the country

Illustrations.

1. *H*, domiciled in England, marries in London *W*, a Frenchwoman domiciled in France. The rights of the parties to movables are governed by the law of England, just as they would be if *H* and *W* were both domiciled in England.¹

2. *H*, domiciled in England, marries in Switzerland *W*, a Frenchwoman domiciled in Italy. The rights of the parties to movable property are governed by the law of England.

3. *H*, domiciled in England, marries in France *W*, a Frenchwoman. *W* after her marriage inherits £1,000. The right to the money is governed by the law of England.

4. *H*, domiciled in France, marries *W*, a woman domiciled in England. The marriage takes place in London. The rights of *H* over the movables of *W*, and of *W* over the movables of *H*, respectively, are governed by the law of France.

5. *H*, domiciled in England, marries *W*, a woman domiciled in France. It is the intention of both parties to go, immediately after the marriage, and settle in Scotland. This intention they forthwith carry out. Their rights over movables are governed by Scotch law (?).

Exception. — Where the domicil of the parties is changed after marriage, the mutual rights of husband and wife over each other's subsequently acquired movables are (possibly) governed by the law of their domicil at the time of the acquisition.

Comment and Illustration.

Two different views exist as to the effect (in the absence of a marriage contract or settlement) of a change of domicil after marriage on the rights over movables of the husband and wife.

The prevailing view is, that the law of the husband's domicil at the time of the marriage supplies the rule by which the parties tacitly agreed or intended that their property relations as regards movables should be regulated throughout life. On this view, a subsequent change of domicil in no way affects these relations.

where the marriage is celebrated. They are not, however, necessary to the decision of the case. On the other hand, it is to be noted that under the Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. cap. 21), s. 1, the application of the Act on the property of a married woman is made to depend on the husband having his domicil in Scotland at the time of the marriage.

¹ *I. e.*, *W*'s rights are governed (assuming the marriage to take place after 1st January, 1883) by the Married Women's Property Act, 1882, and the Acts amending the same.

H and *W*, domiciled in England, are there married. They afterwards become domiciled in France, where they make large gains in trade. Our Courts, on the view now under consideration, would hold that the rights of the husband and wife respectively to such gains ought to be determined with reference to the rules, not of French, but of English law.¹

A different view has obtained currency in the United States. American Courts and writers of repute hold that a change of domicile involves the intention to submit, as to future acquisitions, to the law of the new domicile, and hence that, "where married persons transfer their domicile to another State, their subsequent acquisitions in the latter State are governed by its laws, and not by the former laws."² On this view, the rights of the parties in the supposed case to the gains made after settlement in France would depend on French, not on English law.

Which of these two views will be finally adopted by our Courts is, it is conceived, fairly open to doubt. The validity, therefore, of the Exception to Rule 171 must be considered an open question.

All writers, it should be noticed, appear to admit that a change of domicile does not affect the rights of husband or wife to property fully acquired by either of them under the law of their former domicile.³

"If married persons remove from one jurisdiction to another, it is the teaching of adjudications, the same as of legal reason, that they carry with them to the new jurisdiction those rights of property which the law of the old jurisdiction gave them when they left it. For example: If, where the common law prevails, a man and woman are married, and she has a purse of money in her pocket, or watch at her belt, this money or watch becomes the actual property of her husband, although it does not come otherwise into his possession. Then, if the parties remove to a State where the laws secure to the wife what was hers before marriage, the ownership in this property is not transferred back to her, but remains his in the new locality as it was in the old. This rule applies also to property of the wife acquired after

¹ "In the absence of express contract, the law of the matrimonial domicile regulates the rights of the husband and wife in the movable property belonging to either of them at the time of the marriage, or acquired by either of them during the marriage." *Westlake*, 3rd ed., p. 68.

² 2 *Bishop, Law of Married Women*, s. 569. See 1 *Bishop, Marriage and Divorce*, 5th ed., s. 405.

³ That this must be so results from General Principle No. I., Intro., p. 22, *ante*.

"marriage. If, by the law of the place, it vests in the husband, "it remains his after the removal to a State whose laws secure the "like property to the wife under corresponding circumstances."¹

H, domiciled in England, marries *W*, a Frenchwoman domiciled in France. Whilst in England they make £2,000 in trade. They afterwards acquire a domicile in France, and whilst there domiciled make £1,000. The rights of *H* and *W* to the £2,000 are governed by English law. But, if the Exception hold good, their respective rights over the £1,000 are governed by French law.

RULE 172.²—Where there is a marriage contract or settlement, the terms of the contract or settlement govern the rights of husband and wife in respect of all movables within its terms which are then acquired or are afterwards acquired.³

Comment.

Parties to a marriage contract may regulate their mutual rights to property on whatever terms they think fit, and our Courts will, in general, enforce the terms which the parties have agreed upon. In 1803 *H* and *W*, British subjects domiciled in England, married in Paris. Their marriage contract stipulated that their rights over property should be regulated in accordance with French law. Under this law a wife has a power of making a will. It was held by our Courts that such a contract was to be enforced, and that

¹ 2 *Bishop, Law of Married Women*, s. 566. He raises a curious question as to the effect of change of domicile on a wife's *choses in action* not reduced into the husband's possession.

² Capacity to contract, at any rate as regards contracts connected with marriage, depends on the law of a person's domicile (see Rule 146, p. 543, *ante*). Hence the capacity of each one of the parties to an intended marriage to enter into a marriage contract (*i. e.*, execute a settlement before the marriage) depends upon the law of his or her respective domicile at the time of entering into the contract or executing the settlement. *In re Cooke's Trusts*, 1887, 56 L. J. Ch. 637; *Cooper v. Cooper*, 1888, 13 App. Cas. 88, with which compare *Duncan v. Dixon*, 1890, 44 Ch. D. 211; *Carter v. Silber*, [1892] 2 Ch. (C. A.) 278.

³ *Story*, s. 143; *Feaubert v. Turst*, 1702, Pre. Ch. 207; *Anstruther v. Adair*, 1834, 2 My. & K. 513; *Williams v. Williams*, 1841, 3 Beav. 547; *Este v. Smyth*, 1854, 18 Beav. 112, 23 L. J. (Ch.) 705; *Duncan v. Cannan*, 1854, 18 Beav. 128; 23 L. J. (Ch.) 265; *Bank of Scotland v. Cuthbert*, 1813, 1 Rose, 481; *Watts v. Shrimpton*, 1856, 21 Beav. 97; *McCormick v. Garnett*, 1854, 5 De G. M. & G. 278; *Van Grutten v. Digby*, 1862, 31 Beav. 561; 32 L. J. (Ch.) 179; *Byam v. Byam*, 1834, 19 Beav. 58.

the rights of the parties were the same that French subjects would have had under such a contract, and that, therefore, a will by the wife was valid.¹

SUB-RULE 1.² — A marriage contract or settlement will, in the absence of reason to the contrary, be construed with reference to the law of the matrimonial domicile.³

Comment and Illustration.

"It appears to be a well-settled principle of law in relation to contracts regulating the rights of property consequent upon marriage, as far at least as personal property is concerned, that, if the parties marry with reference to the laws of a particular place or country as their future domicile, the law of that place or country is to govern as the place where the contract is to be carried into full effect."⁴

H and *W*, persons domiciled in Scotland, marry in London. A marriage contract or settlement is made between them in the Scotch form. *H* and *W* afterwards become domiciled in England. The rights of the parties are, nevertheless, to be decided with reference to Scotch law; for "this contract, though prepared in England and a valid English contract, is to be governed by the Scotch law, and the construction and operation of it must be the same whether in or out of Scotland."⁵

¹ *Este v. Smyth*, 1854, 18 Beav. 112. The form of the marriage contract or settlement ought, it would seem, to depend on the law of the place where it is made (see Rule 147, p. 549, *ante*). Our Courts, however, at any rate when one of the parties to a marriage contract is a British subject and the property dealt with is in England, show a strong inclination not to hold it invalid on account of merely formal invalidity under the *lex loci contractus*. (See Exception 3, p. 552, *ante*, to Rule 147; *Van Grutten v. Digby*, 1862, 32 L. J. Ch. 179; 31 Beav. 561.

² This and the following Sub-Rules are in reality applications of the general principle embodied in Rule 149, *ante*, that the interpretation of a contract is determined in accordance with the law by which the parties may be presumed to have intended that it should be governed. And see Rule 143, p. 540, *ante*.

³ See *Duncan v. Cannan*, 1854, 18 Beav. 128; 23 L. J. (Ch.) 265; *Byam v. Byam*, 1854, 19 Beav. 58; *Colliss v. Hector*, 1875, L. R. 19 Eq. 334; *Chamberlain v. Napier*, 1880, 15 Ch. D. 614; *Anstruther v. Adair*, 1834, 2 My. & K. 513; *Le Breton v. Miles*, 8 Paige, 261 (Am.); 1 *Bishop, Law of Marriage and Divorce*, 5th ed., s. 404. "The decisions of the English tribunals establish . . . that where there is an express contract it is governed, as to its construction, by the law of the matrimonial domicile." *Phillimore*, s. 466.

⁴ *Le Breton v. Miles*, 8 Paige, 261, 265, *per Curiam*. This statement of the law, though extracted from an American case, may be taken as representing the doctrine of English Courts.

⁵ *Duncan v. Cannan*, 1854, 23 L. J. (Ch.) 265, 273, *per Romilly*, M. R.

SUB-RULE 2. — The parties may make it part of the contract or settlement that their rights shall be subject to some other law than the law of matrimonial domicile, in which case their rights will be determined with reference to such other law.¹

Illustration.

H and *W*, domiciled in England, make it part of their marriage contract that their rights shall be regulated in accordance with the law of France. Our Courts will, as far as possible, give effect to the contract in accordance with French law.²

SUB-RULE 3. — The law of the matrimonial domicile will, in general, decide whether particular property (*e. g.*, any future acquisition) is included within the terms of the marriage contract or settlement.

Comment.

The law with reference to which the marriage contract or settlement is construed, which is in general the law of the matrimonial domicile, must, it is conceived, as far as the question is a matter of law, determine whether any particular class of movable property, *e. g.*, goods and chattels acquired after the marriage, are included within the terms of the contract.

Property not included within the terms of the contract will be regulated by the rules applicable to cases where there is no marriage contract.³

SUB-RULE 4. — The effect or construction of the marriage contract or settlement is not varied by a subsequent change of domicile.⁴

¹ *Este v. Smyth*, 1854, 23 L. J. (Ch.) 705; 18 Beav. 112; *Duncan v. Cannan*, 1854, 18 Beav. 128; *Chamberlain v. Napier*, 1880, 15 Ch. D. 614. The same result would follow if it could be fairly inferred from the terms of the contract that the intention of the parties (though not expressed in so many words) was that it should be construed with reference to French law.

² *Ibid.*

³ See Rule 171, p. 648, *ante*; *Hoare v. Hornby*, 1843, 2 Y. & C. 121; *Anstruther v. Adair*, 1834, 2 My. & K. 513; *Duncan v. Cannan*, 1854, 18 Beav. 128; 23 L. J. (Ch.) 265; *Phillimore*, s. 476.

⁴ See *Duncan v. Cannan*, 1854, 18 Beav. 128; 23 L. J. (Ch.) 265.

Comment.

The effect of a contract must depend on the intention of the parties at the time of making it. A marriage contract or settlement must, therefore, be construed with reference to the law, whatever it was, which the parties had in view when the contract was made, *i. e.*, the law of the matrimonial domicile at the time of the marriage. No later change of domicile can affect its meaning.

RULE 173.¹—The mutual rights of husband and wife in respect of succession to movables on the death of the other are, in so far as they are not determined by any marriage contract or settlement, governed by the law of the deceased's domicile at the time of his or her death.

Comment.

As the wife's domicile is legally that of her husband, this Rule amounts in fact to saying that the right to succession between the parties will depend in every case upon the domicile of the husband at the time when the death (in respect of which succession is claimed) takes place. If the husband dies first, the domicile to be looked to is his domicile at the time of his own death. If the wife dies first, the domicile in question is that of the husband at the time of her death. This Rule applies, of course, only in so far as is consistent with the terms of any marriage contract or settlement.

¹ See *Westlake*, p. 73, s. 42 ; *Savigny*, s. 379, p. 298.

AMERICAN NOTES.

CHAPTER XXVI.

MARRIAGE.

1. **VALIDITY OF MARRIAGE.** — A marriage valid where it was contracted is valid everywhere. *Commonwealth v. Lane*, 113 Mass. 458, 462, 463; *Commonwealth v. Graham*, 157 Mass. 73; *Van Storch v. Griffin*, 71 Pa. St. 240; *Ditson v. Ditson*, 4 R. I. 87; *Harding v. Alden*, 9 Me. 140; *Simonds v. Allen*, 33 Ill. App. 512; *Campbell v. Crampton*, 18 Blatchf. C. C. 150, 155; 2 Fed. Rep. 417; *For. Rel. of the U. S.* 1887, pp. 295, 1133; 1 *Bishop, Marriage, Divorce, and Separation*, s. 838. To this rule the only exceptions, in the absence of statute, are marriages which are polygamous or incestuous. *Commonwealth v. Lane*, 113 Mass. 458, 463; *Commonwealth v. Graham*, 157 Mass. 73; *Stevenson v. Gray*, 17 B. Mon. 193. By "incestuous" in this relation is meant "incestuous according to the general opinion of Christendom; and by that test, the prohibited degrees include, beside persons in the direct line of consanguinity, brother and sisters only, and no other collateral kindred." *Commonwealth v. Lane*, 113 Mass. 458, 463. *Wharton, Conf. of L.*, while suggesting that matrimonial capacity should be determined by national policy, says that our policy is "to sustain matrimonial capacity in all cases of persons arrived at puberty, and free from the impediment of prior ties," s. 165. Aliens as well as citizens must comply with the forms of the *lex loci celebrationis*, *Roche v. Washington*, 19 Ind. 53; "and the only exceptions are when those forms are such as the parties cannot conscientiously comply with, or when the solemnisation is in a barbarous or semi-civilised land." 3 *Wharton's Int. Law Dig.* 977, 978-983; 11 Alb. L. J. 33.

As a rule, a marriage invalid where it was contracted is invalid elsewhere. *Webster v. Webster*, 58 N. H. 3; *Simonds v. Allen*, 33 Ill. App. 512. In New York, however, it has been held that the marriage of a resident of that State in a foreign country, though invalid by the law of such country, "may be treated (in New York) as a contract to marry *per verba de presenti*, and treated as valid when followed by cohabitation and by reason of such cohabitation." *Wilcox v. Wilcox*, 46 Hun, 32. And, in the absence of proof that by the foreign law a marriage *per verba de presenti* of a person domiciled in New York is invalid, its validity will be presumed. *Hynes v. McDermott*, 82 N. Y. 41; 37 Am. Rep. 538; 91 N. Y. 451; 43 Am. Rep. 677; 7 Abb. N. Cas. 98.

Where a Chinaman in the United States contracted a marriage with a Chinese woman who was at the time in China, it was held that the marriage, not having been solemnised in the United States nor in accordance with their laws, was invalid, though it may have been valid under the laws of China. *In re Lum Sin Ying*, 59 Fed. Rep. 682.

A marriage, if valid where it was contracted, is, in the absence of an express

statute to the contrary, valid in the State in which the parties are domiciled, though they may have left such State and gone elsewhere to be married, for the purpose of evading the prohibitions of its laws. *Commonwealth v. Graham*, 157 Mass. 73; *Commonwealth v. Lane*, 113 Mass. 458; *Van Voorhis v. Brintnall*, 86 N. Y. 18; 40 Am. Rep. 505; *Thorp v. Thorp*, 90 N. Y. 602; 43 Am. Rep. 189; *Moore v. Hegeman*, 92 N. Y. 521; *Stack v. Stack*, 6 Demarest, 280; *Stevenson v. Gray*, 17 B. Mon. 193. See *Succession of Hernandez* (La.), 15 So. 461, 468-470. This principle was applied in Massachusetts to a marriage between a negro and a white person at a time when such a marriage was forbidden by the laws of that State. *Medway v. Needham*, 16 Mass. 157. In other States a contrary doctrine has in such case been maintained. *Williams v. Oates*, 5 Ired. 535; *State v. Kennedy*, 76 N. C. 251; *Kinney v. Commonwealth*, 30 Gratt. 858; 32 Am. Rep. 690. But where a white woman went from North Carolina to South Carolina to marry a negro, who was domiciled in the latter State, where such a marriage was not forbidden, it was held, when the parties soon after settled in North Carolina, that the marriage was valid. *State v. Ross*, 76 N. C. 243. A marriage in France between a white person and a person of color was held to be invalid in Louisiana, where the parties were domiciled. *Dupre v. Boulard*, 10 La. An. 411. The marriage was treated as having been contracted in fraud of the laws of Louisiana. *Succession of Caballero*, 34 La. An. 580. But where two such persons, after cohabiting in Louisiana, acquired a domicile and were married in Spain, the marriage was recognised as valid after they had reacquired a domicile in Louisiana. *Succession of Caballero*, 34 La. An. 580. "Marriages between blacks and whites are still prohibited in some of the States, but a decree in such a State annulling a marriage of this character, valid where contracted, could not be here regarded." *Cummington v. Belchertown*, 149 Mass. 223, 227.

2. ASSIGNMENT OF MOVABLES IN CONSEQUENCE OF MARRIAGE. — In the absence of a marriage contract or settlement, the mutual rights of husband and wife as to each other's movables are governed by the law of the matrimonial domicile, which is the actual (or intended) domicile of the husband. *Wadsworth v. Henderson*, 16 Fed. Rep. 447; *Mason v. Fuller*, 36 Conn. 160; *Richardson v. De Giverville*, 107 Mo. 422; *Glenn v. Glenn*, 47 Ala. 204; *Succession of Christie*, 20 La. An. 283; *Succession of McKenna*, 23 La. An. 360; *Hyman v. Schlenker*, 44 La. An. 108; *Succession of Hernandez* (La.), 15 So. 461; *Parrett v. Palmer* (Ind.), 35 N. E. 713; *Walker v. Marseilles* (Miss.), 12 So. 211; *Townes v. Durbin*, 3 Met. (Ky.) 352. Where the domicile is subsequently changed, rights as to property acquired after such change are governed by the law of the actual domicile. *Saul v. His Creditors*, 5 Mart. N. S. 569; *Muns v. Muns*, 29 Minn. 115; *Lyon v. Knott*, 26 Miss. 548; *Gidney v. Moore*, 86 N. C. 484; *Castro v. Illies*, 22 Tex. 479; *Besse v. Pellochoux*, 73 Ill. 285; *Wadsworth v. Henderson*, 16 Fed. Rep. 447. But rights vested by the law of the original domicile are not divested by a change of domicile. *Bonati v. Welsh*, 24 N. Y. 157; *Bush v. Garner*, 73 Ala. 162; *Cahalan v. Monroe*, 70 Ala. 271; *Davis v. Zimmerman*, 67 Pa. St. 70; *Lyon v. Knott*, 26 Miss. 548; *Columbia Bank v. Walker*, 14 Lea (Tenn.), 299. A statute protecting property of the wife against debts of her husband may be enforced in respect to property, personal as well as real, in the enacting State, though by the law of the matrimonial domicile the property was not so protected. *Smith v. McAtee*, 27 Md. 420.

Obligations created by a woman, valid by the law of her domicile, may be enforced against her property in another State. *Wood v. Wheeler*, 111 N. C. 231; *Read v. Brewer* (Miss.), 16 So. 350; *Clanton v. Barnes*, 50 Ala. 262.

Taking a wife's property from one State into another will not convert an equitable title into a legal one. *Gluck v. Cox*, 75 Ala. 310.

3. EFFECT OF MARRIAGE CONTRACT. — Such a contract will be admitted to govern the movables of the parties everywhere, unless it contravenes some policy of the country where it is sought to be enforced. *Besse v. Pellochoux*, 73 Ill. 285. Where the contract is made in one place and the parties immediately remove to another place, it is construed according to the laws of the latter, the intended domicile. *Davenport v. Karnes*, 70 Ill. 465. See *Besse v. Pellochoux*, 73 Ill. 285.

As to movables, the rights of husband and wife (of one upon the death of the other) are, if not determined by the marriage contract, governed by the law of the deceased person's domicile at the time of his or her death. *Estate of Baubichon*, 49 Cal. 18; *Wharton, Conf. of L.* s. 193.

CHAPTER XXVII.

TORTS.¹

RULE 174.² — Whether an act done in a foreign country is or is not a tort (*i. e.*, a wrong for which an action can be brought in England) depends upon the combined effect of the law of the country where the act is done (*lex loci delicti commissi*) and of the law of England (*lex fori*).

Comment.

This Rule lays down the principle of which the effect is worked out in Rule 175 and Rule 176. It is the result of General Principle No. I.³ combined with General Principle No. II. (B).⁴

RULE 175.⁵ — An act done in a foreign country is a tort if it is *both*

- (1) wrongful according to the law of the country where it was done, *and*,
- (2) wrongful according to English law, *i. e.*, is an act which, if done in England, would be a tort.⁶

¹ *Westlake*, chap. xi., pp. 235-248; *Foote*, chap. ix., pp. 476-494; *Nelson*, pp. 286-293; *Story*, ss. 307 *d*, 307 *e*; *Wharton*, ss. 474-481; *Savigny* (*Guthrie's transl.*, 2nd ed.), s. 374, pp. 253-256; *Bar* (*Gillespie's transl.*, 2nd ed.), ss. 286, 287, pp. 634-642.

² See Intro., p. 36, *ante*; and see Rule 175 and Rule 176, p. 660, *post*; *Chartered Bank of India v. Netherlands &c. Co.* 1883, 10 Q. B. D. (C. A.) 521, 536, 537, judgment of Brett, L. J. Compare *Phillips v. Eyre*, 1869, L. R. 4 Q. B. 225; 1870, L. R. 6 Q. B. (Ex. Ch.) 1, 28, 29, judgment of the Court, delivered by Willes, J.

³ See Intro., p. 22, *ante*.

⁴ See Intro., p. 32, *ante*.

⁵ *Scott v. Seymour*, 1862, 1 H. & C. 219 (Ex. Ch.); 32 L. J. Ex. 61.

⁶ But note that no action can be brought in England for any injury to foreign land. See Rule 39, p. 214, *ante*; *British S. Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602, reversing judgment of Court of Appeal, [1892] 2 Q. B. (C. A.) 358.

Comment.

Clause (1) is an obvious result of the principle enjoining the recognition of rights duly acquired under the law of any civilised country.¹ If *X* knocks *A* down in Naples, and *A* acquires under Italian law a right of action against *X* for the assault, it follows that *primâ facie* *A* has in England a right of action against *X*.

Clause (2) merely excludes the possibility of there being anything to prevent the enforcement in England of a right duly acquired under the law of a foreign country. If *X* assaults *A* in Naples under circumstances which would have given *A* a right of action had the assault been committed in England, there is clearly *primâ facie* no reason why English Courts should refuse to enforce *A*'s claim to damages.

Illustrations.

1. *X*, a British subject, commits what, according to English law, is an assault on *A*, a British subject, at Naples, where the act is wrongful, and damages for it are recoverable by proper proceedings. The assault is a tort.²

2. *X*, an Italian subject, commits what, according to English law, is an assault on *A*, an Italian subject, at Naples, where the act is wrongful, and damages for it are recoverable by proper proceedings. The assault is a tort.

3. *X* publishes at Paris a statement about *A* which, according to English law, is a libel. The publication is wrongful and actionable according to the law of France. The publication is a tort.

4. *X* assaults *A* in a foreign country where the assault is wrongful, but does not give rise to an action or any other proceeding for damages. Whether it is a tort and actionable in England?³

RULE 176. — An act done in a foreign country is not a tort if it is not *both*

(1) wrongful according to the law of the country where it was done,⁴ *and*,

¹ See Intro., General Principle No. I., p. 22, *ante*.

² *Scott v. Seymour*, 1862, 1 H. & C. 219, 231 (Ex. Ch.); 32 L. J. Ex. 61.

³ See pp. 661, 662, *post*.

⁴ *Phillips v. Eyre*, 1869, L. R. 4 Q. B. 225; 1870, L. R. 6 Q. B. (Ex. Ch.) 1; *Dobree v. Napier*, 1836, 2 Bing. N. C. 781; *Reg. v. Lesley*, 1860, 1 Bell. Cro. Cas. 220; 29 L. J. M. C. 97.

(2) wrongful according to English law.¹

Comment.

Clause (1) is an application of the general principle that an action must be based upon a duly acquired right. The plaintiff has acquired no right under the law of the country where the alleged tort was committed, and the law of England does not apply to acts committed in a foreign country.²

"The rule which obtains in respect of property and civil contracts — namely, that an act, unless intended to take effect elsewhere, shall, as regards its effect and incidents, if a conflict of law arises between the *lex loci* and the *lex fori*, be governed by the former — appears to us to be applicable to the case of an act occasioning personal injury. To hold the contrary would be attended with the most inconvenient and startling consequences, and would be altogether contrary to that comity of nations in matters of law to which effect should, if possible, be given. An act might not only be lawful, but might even be enjoined by the law of another country, which would be wrongful and give a right of action by our law, and it certainly would be in the highest degree unjust that an individual who has intended to obey the law binding upon him should be held liable in damages in another country where a different law may prevail. Thus, an arrest and imprisonment might be perfectly justified by the law of a foreign country under circumstances in which it would be actionable here. It would be impossible to hold that in such a case an action could be maintained in an English Court."³

Clause (2) may be thus explained: The theoretical ground for the refusal to entertain an action for an act not tortious under English law is the objection to giving damages, or in effect punishing a proceeding which English law does not condemn.⁴

Our Rule suggests some questions of difficulty.

First Question. — Can an act constitute an actionable wrong which, though tortious by the law of England and not strictly justifiable under the law of the country where it has been done, yet is not there actionable?

On the answer to this inquiry there exists some difference of opinion.

¹ *The Halley*, 1868, L. R. 2 P. C. 193. See as to the ground of the Rule, Intro., pp. 35, 36, *ante*.

² See Intro., General Principle No. I., p. 22, *ante*.

³ *Phillips v. Eyre*, 1869, L. R. 4 Q. B. 225, 239, judgment of *Cockburn*, C. J.

⁴ See Intro., General Principle No. II. (B), p. 32, *ante*.

The opinion of Lord Esher seems to be that an action of tort cannot be maintained in England for an act done in a foreign country unless the act complained of is strictly *actionable* in that country; ¹ and this appears to be also the view of Williams, J., in *Scott v. Seymour*.² In the same case, on the other hand, Wightman, J., and probably Willes, J., and Blackburn, J., incline to the opinion that, at any rate as between British subjects, an action is maintainable for any act which would have been a tort if done in England, and, whether actionable or not, was unjustifiable or wrongful in a wide sense of the term, according to the law of the foreign country where the act was done.³ On the whole we may probably, though not certainly, conclude that any act, *e. g.*, an assault, which is at once unjustifiable, even though not actionable, by the law of the foreign country where it is done, and also tortious by the law of England, is in England an actionable wrong. Logically, however, this conclusion is difficult to defend, and there is a good deal to be said in favour of the view apparently maintained by Lord Esher and Mr. Justice Williams. It is hard to see why an Italian or an Englishman who assaults either an Italian subject or a British subject at Naples, and does not thereby incur, under the law of Italy, liability to the payment of damages, should become liable to pay them when an action is brought against him in England. Italian law imposes no such liability, and English law does not extend to Italy.

Second Question.—Does anything depend upon the answer to the inquiry whether the wrong-doer and the person wronged both or either of them are British subjects?

This question must probably be answered in the negative.

"If, indeed," says Blackburn, J., with regard to a particular case, "the plea had averred that by the law of Naples no damages are recoverable for an assault, however violent, that would have raised a question upon which I have not at present made up my mind. I doubt whether it would be a good bar, but, supposing it would, I am disposed to think that the fact of the parties being British subjects would make no difference. As at present advised, I think that, when two British subjects go into a foreign country, they owe local allegiance to the law of that country, and are as much governed by that law as foreigners. The point,

¹ See *Chartered Mercantile Bank of India v. Netherlands &c. Co.* 1883, 10 Q. B. D. (C. A.) 521, 536, 537, judgment of Brett, L. J.

² 1862, 1 H. & C. 219, 235.

³ *Ibid.*, 234, 236, 237.

"however, is not now raised, and it is unnecessary to express any opinion upon it."¹

This opinion of Lord Blackburn is hesitatingly expressed, but is, it is submitted, clearly sound, and may (if confined to acts done in a civilised country) be applied to its fullest extent. The civil rights and liabilities of the parties before an English Court are, subject to the rarest exceptions, not affected by their nationality.

Third Question. — How far is an act wrongful by English law actionable if committed beyond the limits of a civilised country?

This question applies either to acts done in a country which is not civilised, or to acts done on the high seas.

As to acts done in an uncivilised country. — With this matter these Rules are not concerned.² For the statement of such conclusions with regard to it as English cases apparently warrant, readers are referred to the Appendix.³

As to acts done on the high seas. — An act done on board a ship on the high seas must be treated as an act done in the country to which the ship belongs, *e. g.*, England, France, or Italy. We are, therefore, here concerned solely with the law applicable to collisions at sea.⁴ There certainly is some ground for the assertion that collisions at sea, even though both or either of the ships should happen to be foreign ships, since they take place outside the territorial jurisdiction of any state, are in an English Court to be treated as governed by English law; and it is the opinion of Brett, L. J., that "an action for a tort committed on the high seas between two foreign ships . . . can be maintained in this country although it is not a tort according to the laws of the Courts in that foreign country;"⁵ and therefore, in a case where both the ships in collision were Dutch ships, and English plaintiffs brought an action for damage done to their goods by negligence of one of the ships, it has been laid down by Brett, L. J., that, "as the injury to the plaintiffs was committed by the servants of the defendants, not in any foreign country, but on the high seas, which are subject to the jurisdiction of all countries, the question of negligence in a collision raised in a suit in this country is to be tried, not, indeed, by the common law of England, but by the maritime law, which is part of the common law of England as administered in this country."⁶

¹ *Scott v. Seymour*, 1862, 1 H. & C. 219, 237, judgment of Blackburn, J.

² See Intro., pp. 29, 30, *ante*.

³ See App., Note 1, *Law governing Acts done in Uncivilised Countries*.

⁴ *Foote*, pp. 486-492; *Westlake*, pp. 240-247.

⁵ *Chartered Mercantile Bank of India v. Netherlands &c. Co.* 1883, 10 Q. B. D. (C. A.) 521, 537, per Brett, L. J.

⁶ *Ibid.*

Prior to 1862, difficult and doubtful questions were raised as to the law relating to collisions between an English and a foreign ship, or between foreign ships on the high seas, or in foreign or in English waters. But it is now unnecessary to discuss them at length, since they were set at rest by the Merchant Shipping Amendment Act, 1862, 25 & 26 Vict. cap. 63, which, though repealed, has, as regards this matter, been re-enacted in substance by the Merchant Shipping Act, 1894.¹

The following points may be noted : —

1. The limitation of liability under the Merchant Shipping Act, 1894, and the rule as to damages for collision contained in the Judicature Act, 1873, s. 25, sub-s. 9, apply to any ship, whether British or foreign, either on the high seas or in British territorial waters.²

Thus, a collision takes place in the Mediterranean between an English and a Belgian ship, whereby the latter and her cargo are sunk. In an action against the English ship, the liability of the owner is limited by the provisions of the Merchant Shipping Act, 1894, s. 503,³ and, if the wrong-doer had been the Belgian ship, the liability of the owner would, in an action against the Belgian ship, have been equally limited.

2. In case of a collision in British territorial waters or, apparently, on the high seas, the owner of a foreign ship cannot avail himself of any exemption from,⁴ or limitation on,⁵ his liability for damage which is conferred upon him by the law of the ship's flag.

A Spanish ship comes into collision with, and causes damage to, a British ship on the high seas. *X*, the owner of the Spanish ship, is a Spanish subject, and is, by the special circumstances

¹ See Merchant Shipping Act, 1894 (57 & 58 Vict. cap. 60), s. 503.

² *The Amalia*, 1863, 1 Moore P. C. N. s. 471, 474, 475, judgment of Dr. Lushington. Compare, as to the state of the law under the Merchant Shipping Act, 1854, *Cope v. Doherty*, 1858, 4 K. & J. 367; 2 De G. & J. 614; *The Wild Ranger*, 1862, Lush. 553; *General Iron Screw Co. v. Schurmanns*, 1860, 1 J. & H. 180.

³ *The Amalia*, 1863, 1 Moore P. C. N. s. 471. The Merchant Shipping Act, 1894, s. 503, re-enacts in substance the Merchant Shipping Act, 1862, s. 54, under which this case is decided.

⁴ *The Leon*, 1881, 6 P. D. 148; *Chartered Mercantile Bank of India v. Netherlands &c. Co.* 1883, 10 Q. B. D. (C. A.) 521, 537, 544; *The Wild Ranger*, 1862, Lush. 553; *The Zollverein*, 1856, Swabey, 96. See Foote, 2nd ed., pp. 490, 491; but contrast *Westlake*, 3rd ed., pp. 242, 243, ss. 202, 202 A, and p. 245. Mr. Westlake appears to incline to the opinion that the liability of a foreign shipowner depends on the law of the flag.

⁵ *Ibid.*

under which the collision takes place, exempted by Spanish law from liability. The exemption does not free him¹ from liability.²

A Spanish ship comes into collision with, and causes damage to, a French ship on the high seas. *X*, the owner, is a Spanish subject, and is, under the special circumstances of the case, exempted by Spanish law from liability. Semble, the exemption does not free him from liability.³

Illustrations.

1. *X*, a British subject, seizes in Portugal the goods of *A*, a British subject, under circumstances which make the seizure lawful according to Portuguese law, though the seizure would have been wrongful if it had taken place in England. The seizure is not a tort.⁴

2. *X* imprisons *A* in Jamaica under circumstances which, if the act had been done in England, would have rendered *X* liable to an action for false imprisonment. The imprisonment is not wrongful according to the law of Jamaica. It is not a tort.⁵

3. A British ship, through negligence of the master and crew, comes into collision with and damages a boat of *A*'s in a foreign harbour. *X* is the owner of the British ship. Under the law of the foreign country he is not liable for damage caused by the negligence of the master and crew of his ship. *X* has not committed a tort.⁶

4. The *Halley*, a British ship, of which *X*, a British subject, is owner, comes into collision with and damages, when in Belgian waters, the ship of *A*. The damage is caused through the negligence of *N*, a pilot, whom *X*, by Belgian law, is compelled to employ. *X* is, under Belgian law, liable to an action for the damage done to *A*'s ship; under English law *X* is, on the ground of his employing *N*, protected from liability. *X*'s act is not a tort.⁷

5. *X* publishes in writing in a foreign country a false and defamatory statement concerning *A*'s deceased father, for which *X*

¹ *I. e.*, in proceedings in an English Court.

² *The Leon*, 1881, 6 P. D. 148.

³ *Conf. Chartered Mercantile Bank of India v. Netherlands &c. Co.* 1883, 10 Q. B. D. (C. A.) 521, 537, judgment of *Brett*, L. J.

⁴ *I. e.*, is not actionable in England. Compare *Dobree v. Napier*, 1836, 2 Bing. N. C. 781; *Blad's Case*, 1673, 3 Swanst. 603, and *Blad v. Bamfield*, 1674, 3 Swanst. 604; *Phillips v. Eyre*, 1870, L. R. 6 Q. B. 1, 29, judgment of *Willes*, J.

⁵ See *Phillips v. Eyre*, 1870, L. R. 6 Q. B. 1. *Conf. Reg. v. Lesley*, 1860, Bell, Cro. Cas. 220; 29 L. J. M. C. 97.

⁶ Compare *The Mazham*, 1875, 1 P. D. 43.

⁷ *The Halley*, 1868, L. R. 2 P. C. 193.

is, under the law of such foreign country, liable to an action for damages. The statement would not render *X* liable to an action if published in England.¹ *X* has not committed a tort.

SUB-RULE. — An act done in a foreign country which, though wrongful under the law of that country at the moment when it was done, has since that time been the subject of an Act of Indemnity passed by the legislature of such country, is not a tort.²

Illustration.

X assaults and imprisons *A* in Jamaica. At the time of the assault, *X*'s act is wrongful both by the law of Jamaica and by the law of England. The assault takes place for the purpose of suppressing a rebellion. The legislature of Jamaica afterwards passes an Act of Indemnity under which the assault is made lawful. The assault is, after the passing of this Act, not a tort.³

¹ See *Rex v. Topham*, 1791, 4 T. R. 126; *Reg. v. Labouchere*, 1884, 12 Q. B. D. 320.

² *Phillips v. Eyre*, 1869, L. R. 4 Q. B. 225; 1870, L. R. 6 Q. B. (Ex. Ch.) 1.

³ *Ibid.*

AMERICAN NOTES.

CHAPTER XXVII.

TORTS.

1. **GENERAL PRINCIPLES ; COMMON-LAW ACTIONS.**—Actions for damages for torts, or civil injuries, to the person or property, being considered as transitory, may generally be maintained in any jurisdiction in which the defendant can be legally served with process. *Mitchell v. Harmony*, 13 How. 115 ; *Knight v. West Jersey R. R. Co.* 108 Pa. St. 250 ; *Helton v. Alabama Midland Ry. Co.* (Ala.) 12 So. 276. See *Dewit v. Buchanan*, 54 Barb. 31. It is essential, however, that the wrong complained of, though it is actionable according to the *lex fori*, should also be actionable according to the law of the State or country in which it occurred or was committed, *Debevoise v. N. Y. & C. R. R.* 98 N. Y. 377 ; *Wooden v. W. N. Y. & P. R. R. Co.* 126 N. Y. 10 ; *Kahl v. Memphis & C. R. Co.* 95 Ala. 337 ; 10 So. 661 ; *Carter v. Goode*, 50 Ark. 155 ; *Hyde v. Wabash & C. Ry. Co.* 61 Iowa, 441 ; 47 Am. Rep. 820 ; *Alexander v. Pennsylvania Co.* 48 Ohio St. 623 ; 30 N. E. 69 ; *De Harn v. Mexican Nat. Ry. Co.* 86 Tex. 68 ; 23 S. W. 381 ; *W. U. Tel. Co. v. Phillips* (Tex. Civ. App.), 21 S. W. 638 ; even though the negligence from which the injury resulted occurred in the State in which the action is brought, *Alabama Great Southern R. R. Co. v. Carroll*, 97 Ala. 126 ; 11 So. 803. In actions at common law this identity or similarity of law is assumed to exist, in the absence of reasons to the contrary, such as the circumstance that the common law does not prevail at the place where the injury was received. *Walsh v. N. Y. & N. E. R. R. Co.* 160 Mass. 571 ; 36 N. E. 584 ; *Burdick v. Missouri Pac. Ry.* (Mo.) 27 S. W. 453.

2. **STATUTORY ACTIONS.**—In the case of statutory actions, it is necessary affirmatively to show that the wrong complained of is actionable by the law of the place where it was committed. *McDonald v. Mallory*, 77 N. Y. 547 ; *Debevoise v. New York, Lake Erie & C. R. Co.* 98 N. Y. 377 ; 50 Am. Rep. 683 ; *Kahl v. Memphis & C. R. Co.* 95 Ala. 337 ; 10 So. 661 ; and other cases cited *supra*. Whether it must also be actionable by the law of the place where the action is brought, and whether, if it be so, the action can be maintained, are questions that require particular consideration.

Laws penal in their nature do not operate extra-territorially, and are not extra-territorially enforced. *Le Forest v. Tolman*, 117 Mass. 109 ; *O'Reilly v. N. Y. & N. E. R. R. Co.* 16 R. I. 388 ; 19 Atl. 244 ; *Carnahan v. Western Union Tel. Co.* 89 Ind. 526 ; 46 Am. Rep. 175 ; *Jones v. Fidelity Loan & Trust Co.* (S. D.) 63 N. W. 553 ; *Blaine v. Curtis*, 59 Vt. 120. On this ground the Courts in the earlier cases, treating statutory actions for wrongs, and especially those for injuries resulting in death, as penal in their nature, refused, where the right of action arose under a foreign statute, to exercise jurisdiction, without regard to the question whether there was a similar domestic statute. *Woodward v. Michigan & C. Railroad Co.* 10 Ohio St. 121 ; *Richardson v. New*

York Central Railroad Co. 98 Mass. 85; *McCarthy v. Chicago, R. I. & Pac. R. R. Co.* 18 Kan. 46; *Taylor's Admr. v. The Pennsylvania Co.* 78 Ky. 348; *Willis v. Missouri Pacific R. R. Co.* 61 Tex. 423; *Buckles v. Ellers*, 72 Ind. 220. From this view the Court of Appeals of New York departed in *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48; 38 Am. Rep. 491, in which it was held that an action was maintainable under the foreign statute, there being a similar statute in New York. After this decision came the leading case of *Dennick v. Railroad Co.* 103 U. S. 11, in 1881, in which an administratrix, appointed and residing in New York, brought suit against a railway company in a New York court for damages for the negligent killing of her intestate in New Jersey, basing her suit on the New Jersey statute. The defendant, being a citizen of New Jersey, removed the case to the United States Circuit Court, by which it was held that the plaintiff could not recover, on the ground that the right of action given by the New Jersey statute could be enforced only by an administrator or other personal representative appointed by authority of that State. The Supreme Court of the United States, speaking through Mr. Justice Miller, reversed this decision, holding that the action under the New Jersey statute was transitory, and that it might be maintained by an administratrix appointed in New York. "Wherever," said the Court, "by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced, and the right of action pursued in any Court which has jurisdiction of such matters, and can obtain jurisdiction of the parties."

Under the authority or the influence, as the case may be, of this decision, the courts have ceased to assume that the common law embodied all that could be imagined of civil justice, and have generally adopted the view that the rule touching the enforcement of penal laws is not applicable to a statute which merely affords a civil action to recover damages for a civil injury. *Texas & Pacific Railway v. Cox*, 145 U. S. 593; *Wooden v. W. N. Y. & P. R. R. Co.* 126 N. Y. 10; 26 Atl. Rep. 1050; *Usher v. Railroad Co.* 126 Pa. St. 207; 17 Atl. 597; *Higgins v. Railroad Co.* 155 Mass. 176; 29 N. E. 534; *Herrick v. Minneapolis & St. Louis Ry. Co.* 31 Minn. 11; *Laird v. Railroad*, 62 N. H. 254; *Bruce's Admr. v. Cincinnati R. R. Co.* 83 Ky. 174 (overruling *Taylor v. Pennsylvania Co.* 78 Ky. 348, *supra*); *Gardner v. N. Y. & N. E. R. R. Co.* 17 R. I. 790; 24 Atl. Rep. 831; *Illinois Central R. R. Co. v. Crudup*, 63 Miss. 291; *Morris v. Chicago, Rock Island &c. Ry. Co.* 65 Iowa, 727; 54 Am. Rep. 39; *Central Railroad v. Swint*, 73 Ga. 651; *Helton v. Alabama Midland Ry. Co.* (Ala.) 12 So. Rep. 276; *Nelson v. C. & O. R. R. Co.* 88 Va. 971; 14 S. E. 838; *Railway Co. v. Lewis*, 89 Tenn. 235; 14 S. W. 603; *Perry v. Railroad Co.* 29 Kan. 420; *Burns v. Grand Rapids Ry. Co.* 113 Ind. 169; *Cincinnati, H. & D. R. R. v. McMullen*, 117 Ind. 439; *Missouri Pac. Ry. Co. v. Lewis*, 24 Neb. 848. *Contra*, *Ash v. B. & O. R. R. Co.* 17 Md. 144; 19 Atl. 643, citing *Rorer on Interstate Law* (1st ed., 1879), pp. 144, 145, based on the earlier view, which, says the second edition (1893) of the same work, p. 218, "must be regarded as abandoned." *Railway v. McCormick*, 71 Tex. 660; 9 S. W. 540, and *Oates v. Union Pac. Ry. Co.* 104 Mo. 514 (1891), lean to the earlier view. See *Stoeckman v. Railroad Co.* 15 Mo. App. 503 (1884), adopting the doctrine of *Dennick v. Railroad Co.*, *supra*.

3. IDENTITY OF LAW. — Whilst it is thus generally admitted that actions for torts are transitory, must the wrong be actionable according to the *lex fori*, and, if it is so, must the *lex fori* be the same as the *lex loci delicti*?

It is conceded that the law of the place where the tort was committed governs the right of recovery, *Laird v. Railroad*, 62 N. H. 254; *Atlantic & Charlotte Air Line Ry. Co. v. Tanner*, 68 Ga. 384; *Augusta Ry. Co. v. Glover* (Ga.), 18 S. E. 406; *Walsh v. N. Y. & N. E. R. R. Co.* 160 Mass. 571; 36 N. E. 584; *Njus v. C., M. & St. Paul Ry. Co.* 47 Minn. 92; *Railway Company v. Lewis*, 89 Tenn. 235; 14 S. W. 603; *Nelson v. C. & O. R. R. Co.* 88 Va. 971; 14 S. E. 838; *Atchison, Topeka &c. R. R. Co. v. Moore*, 29 Kan. 632; *Shedd v. Moran*, 10 Ill. App. 618; even though, in case of an injury resulting in death, the death occurred elsewhere. *Northern Pacific Railroad v. Babcock*, 154 U. S. 190; 14 Sup. Ct. 978. See *Atlanta &c. Ry. Co. v. Tanner*, 68 Ga. 384. The *lex loci delicti* therefore determines the effect of contributory negligence, *Railway Company v. Lewis*, 89 Tenn. 235; 14 S. W. 603; and of negligence of a fellow-servant, *Herrick v. Minneapolis & St. Louis Ry. Co.* 31 Minn. 11; 47 Am. Rep. 771; *Railroad v. Foster*, 10 Lea (Tenn.), 351; the question of the conversion of personal property, *Torrance v. Third Nat. Bank*, 70 Hun, 44; 23 N. Y. Supp. 1073; and the amount of damages that may be recovered, *Northern Pacific Company v. Babcock*, 154 U. S. 190; 14 Sup. Ct. 978; *Illinois Central R. R. Co. v. Crudup*, 63 Miss. 291; *Morris v. Chicago, R. I. & Pac. Ry. Co.* 65 Iowa, 727; 54 Am. Rep. 39; *Bruce's Admr. v. Cincinnati R. R. Co.* 83 Ky. 174. *Contra*, *Wooden v. W. N. Y. & P. R. R. Co.* 126 N. Y. 10; 26 Atl. 1050, where the amount of damages is treated as a question of remedy, to be determined by the *lex fori*. Questions of evidence are governed by the *lex fori*. *Johnson v. Chicago & N. W. Ry. Co.* (Iowa) 59 N. W. 66; *Skelton v. Alabama Midland Ry. Co.* (Ala.) 12 So. 276.

It is not necessary that the *lex fori* and the *lex loci delicti* should be identical; it is sufficient if they are similar, though they may differ in detail. *Wooden v. W. N. Y. & P. R. R. Co.* 126 N. Y. 10; 26 Atl. 1050; *Geoghegan v. Atlas S. S. Co.* 3 Misc. Rep. 224; 22 N. Y. Supp. 749; *Nelson v. C. & O. R. R. Co.* 88 Va. 971; 14 S. E. 838; *Weaver v. Railroad Co.* 21 D. C. 499; *Morris v. Chicago, Rock Island &c. Ry. Co.* 65 Iowa, 727; 54 Am. Rep. 39; *Bruce's Admr. v. Cincinnati R. R. Co.* 83 Ky. 174; *Wintuska's Admr. v. Louisville & N. R. Co.* (Ky.) 20 S. W. 819; *Higgins v. Central New Eng. &c. Railroad*, 155 Mass. 176, 29 N. E. 534. See *Railway v. McCormick*, 71 Tex. 660; 9 S. W. 540; *Belt v. Gulf &c. Ry. Co.* (Tex. Civ. App.) 22 S. W. 1062. A difference between statutes as to the person to whom the right of action belongs is not material, and the action should be brought by the person to whom the right is given by the law of the State in which the wrong was committed. *Dennick v. Railroad Co.* 103 U. S. 11; *Wooden v. W. N. Y. & P. R. R. Co.* 126 N. Y. 10; 26 Atl. 1050; *Stone v. Groton Bridge & Manuf. Co.* 77 Hun, 99; *Knight v. West Jersey Railroad Co.* 108 Pa. St. 250; *Usher v. Railroad Co.* 126 Pa. St. 206; *Bruce's Admr. v. Cincinnati R. R. Co.* 83 Ky. 174; *Perry v. Railroad Co.* 29 Kan. 420; *Limekiller v. Railroad*, 33 Kan. 83; *Higgins v. Central New Eng. &c. Railroad*, 155 Mass. 176; 29 N. E. 534. *Contra*, *Ash v. B. & O. R. R. Co.* 72 Md. 144; 19 Atl. 643; *Vauter v. Missouri Pac. Ry. Co.* 84 Mo. 679. But see able opinion by Thompson, J., in *Stoeckman v. Railroad Co.* 15 Mo. App. 503. As the plaintiff recovers upon the *lex loci delicti*, it is obvious that, unless the person who has the right of action by that law is permitted to sue, no suit can as a rule be maintained except where the *lex fori* gives the right to the same person. In *Wooden v. W. N. Y. & P. R. R. Co.* 126 N. Y. 10, 26 Atl. 1050, *supra*, a widow, who was competent under the Pennsylvania statute, brought suit in New York for the negligent killing of her husband in Pennsylvania. By the statute of New York, the right of action in a similar case is given to the

deceased's personal representative. It was argued, though in vain, that the widow could not maintain the action in New York, because it was contrary to the New York statute; and it was admitted that she could not sue as administratrix, because that would be contrary to the Pennsylvania statute, by which the right of action was given. But substantially such a negation of remedy was reached in *Ash v. B. & O. R. R. Co.* 72 Md. 144; 19 Atl. 643, *supra*, and *Vauter v. Missouri Pac. Ry. Co.* 84 Mo. 679, *supra*. In the latter case, a widow, whose husband was killed in Kansas, obtained letters in Missouri and brought suit there as administratrix. By the law of Kansas, the right of action in such a case was given to the personal representative; by the law of Missouri, to the widow. It was held that her capacity as administratrix was limited by the law of Missouri, and that she could not maintain the suit. Subsequently, in *Oates v. Union Pac. Ry. Co.* 104 Mo. 514, it was held that a woman whose husband was killed in Kansas could not maintain an action in Missouri as widow, since the Kansas statute gave the right of action to the personal representative. Yet the act of qualifying to sue in Missouri upon the Kansas statute would, under the previous decision, have been self-destructive.

Whether any suit can be maintained, if the *lex fori* does not give a right of action for a similar wrong, is a question which opinions and decisions, since *Dennick v. Railroad Co.* 103 U. S. 11, have often answered affirmatively. "By our law, a private action may be maintained in one State, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the State where the suit is brought." *Huntington v. Attrill*, 146 U. S. 657, citing a passage of the same purport from *Higgins v. Central New Eng. &c. Railroad*, 155 Mass. 176. It was expressly so held in *Herrick v. Minneapolis & St. Louis Ry. Co.* 31 Minn. 11, which is cited with approval in *Northern Pacific Ry. Co. v. Babcock*, 154 U. S. 190; 14 Sup. Ct. 978. See opinions to the same effect in *Laird v. Railroad*, 62 N. H. 254; *Wilson v. Tootle*, 55 Fed. Rep. 211; *Morris v. Chicago, R. I. & Pac. Ry. Co.* 65 Iowa, 727; 54 Am. Rep. 39; *Chicago &c. R. Co. v. Doyle*, 60 Miss. 977; *Illinois Central R. R. Co. v. Crudup*, 63 Miss. 291; *Knight v. West Jersey Railroad Co.* 108 Pa. St. 250. Sometimes cases, *e. g.*, *Wooden v. W. N. Y. & P. R. R. Co.* 126 N. Y. 10, in which there were similar statutes, are cited to show that there must be such statutes. But, obviously, the courts were not required to go so far. They only held that, in view of the similarity of statutes, it was not against the policy or the interests of the State to permit the liability to be enforced. *Knight v. West Jersey Railroad Co.* 108 Pa. St. 250; *Wooden v. W. N. Y. & P. R. R. Co.* 126 N. Y. 10.

4. COLLISIONS AT SEA. — In cases of collision on the high seas between ships of different nationalities, the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted, governs. *The Belgenland*, 114 U. S. 355, 369; *In re State Steamship Co.* 60 Fed. Rep. 1018. This rule is subject to two qualifications: (1) Persons in charge of either ship would not be open to blame for following sailing directions and rules of navigation prescribed by their own government. *The Scotia*, 14 Wall. 170, 184. (2) If the maritime law, as administered by the nations to which the ships respectively belong, is the same in respect of a particular matter, it will, if duly proved, be followed in respect of such matter, though it differ from the maritime law as understood in the country of the litigation. *The Scotland*, 105 U. S. 24, 31.

CHAPTER XXVIII.

ADMINISTRATION IN BANKRUPTCY.

RULE 177.¹—The administration in bankruptcy of the property of a bankrupt which has passed² to the trustee is governed by the law of the country where the bankruptcy proceedings take place (*lex fori*).³

Comment.

A creditor, whether an alien or a British subject, can under an English bankruptcy⁴ prove for any debt, whether it be an English or a foreign debt,⁵ which is due to him from the bankrupt. But a foreigner proving (*e. g.*, for a foreign debt) stands in the

¹ See *Westlake*, 3rd ed., pp. 161, 162; *Foote*, 2nd ed., pp. 295, 296, 312, 313; *Ex parte Melbourn*, 1870, L. R. 6 Ch. 64, especially p. 69, judgment of *Mellish*, L. J.; *Ex parte Holthausen*, 1874, L. R. 9 Ch. 722. And see *Thurburn v. Steward*, 1871, L. R. 3 P. C. 478. Compare *Pardo v. Bingham*, 1868, L. R. 6 Eq. 485, and *In re Kloebe*, 1884, 28 Ch. D. 175, which, though referring to the administration of a deceased person's estate, throws some light on the law governing administration in bankruptcy.

² For the effect of an English bankruptcy as an assignment, see Rule 66, p. 333, *ante*, and as a discharge, see Rule 67, p. 343, *ante*, and Rule 114, p. 454, *ante*.

³ This Rule is in reality an application of the principle that all matters of procedure are governed by the *lex fori*. See chap. xxxi., Rule 188, p. 711, *post*. [See *Reynolds v. Stockton*, 140 U. S. 254; 11 Sup. Ct. 773; *Harrison v. Sierry*, 5 Cranch, 289.]

⁴ As the Rules in this Digest are concerned only with proceedings in England, our Rule, though expressing the general principle followed by English Courts, applies in effect only to an English bankruptcy, and means substantially that under such a bankruptcy the property which has passed to the trustee, *i. e.*, the bankrupt's assets, must be distributed wholly in accordance with the ordinary rules of the English bankruptcy law.

The word "assets," though in this Digest appropriated to the personal property of a deceased person for which an administrator is accountable, is both popularly and legally applicable to the property of a bankrupt which passes to the representative of the creditors for distribution among them.

⁵ *Ex parte Melbourn*, 1870, L. R. 6 Ch. 64. Compare *In re Kloebe*, 1884, 28 Ch. D. 175.

same position as does an English creditor proving for an English debt: the equities available under the law of England against a bankrupt are available against a bankrupt or the trustee as representing him, in respect of rights acquired under the law of a foreign country.¹ The distribution of the assets among the creditors; the priorities among the creditors *inter se*;² every matter, in short, which concerns the administration of the bankrupt's assets, or, in other words, which can be brought under the head of procedure in the very widest sense of that term,—is to be determined in accordance with the ordinary rules of English bankruptcy law; and this is so even though the assets are the proceeds of foreign immovables, *e. g.*, Scotch land, which under the English bankruptcy act has passed to the trustee.

Whilst, however, the mode of dealing with the property which has passed to the trustee, or rather with the proceeds thereof, is governed by the law of England, the question what is the property which has passed to a trustee, and subject to what charges it has passed to him, or, speaking generally, what are the rights of the bankrupt which have passed to the trustee, is a matter to be determined in each case by its appropriate law, *e. g.*, if the right be a right to land in Scotland, then by Scotch law; if the right be acquired under a contract made in a foreign country, then by the law governing the contract, which in many instances will be the law of the foreign country (*lex loci contractus*). We come round, in fact, to the general principle that matters of *procedure* are governed by the *lex fori*, but matters of *right* are governed by the law in accordance with which the particular kind of right is to be determined.³

Question.—How far are the special rules of English bankruptcy law as to the effect of bankruptcy on antecedent transactions⁴ enforceable against foreign creditors?

The answer probably is that these rules may be looked upon as matters of procedure, and in reference, *e. g.*, to the effect of a fraudulent preference will be enforced against a foreign creditor who proves for his debt under an English bankruptcy.⁵

¹ *Ex parte Holthausen*, 1874, L. R. 9 Ch. 722.

² *Ex parte Melbourn*, 1870, L. R. 6 Ch. 64.

³ See, as to procedure, chap. xxxi., p. 711, *post*.

⁴ See Bankruptcy Act, 1883 (46 & 47 Vict. cap. 52), ss. 45–48, taken together with the definition of “property” in s. 168. See also, p. 334, *ante*.

⁵ This is apparently the principle maintained in Scotland. “There is,” writes Goudy, “little authority in the law of Scotland on the subject, but, “so far as the decisions go, it would appear that our Courts will, whenever “they have jurisdiction, enforce our special laws of bankruptcy upon foreign

Illustrations.

1. *H* and *W* are married in Batavia, and before marriage enter into a contract whereby £1,000 is settled on *W* for her separate use. By Batavian law, such a marriage contract has no effect as regards third persons until registered. The contract is never registered. *H* and *W* come to England. *H* is there made bankrupt. *W* claims to prove for the £1,000. The Batavian law as to registration affects a question of remedy or procedure. All questions of priority of creditors are governed by English law (*lex fori*), and *W* is entitled under the English bankruptcy to prove for debt *pari passu* with other creditors.¹

2. *N*, a merchant in London, obtains a loan from *A*, a merchant in Prussia, by depositing with *A* the title deeds of a house at Shanghai. No conveyance or memorandum of deposit is made at Shanghai, and the house remains registered there in the name of *N*. *N* is adjudicated a bankrupt in England. Under English law *A* is entitled as against *N* to have the benefit of the contract, and has a lien on the house at Shanghai. *A*'s rights against *T*, the trustee, are governed by English law (*lex fori*). *T* is bound by the equities which bind the bankrupt, and *A* is entitled to have the house sold and the proceeds thereof, up to the amount of the debt to *A*, transferred to him.²

3. *N* makes a gift of goods to *A* in France. The gift is made after *N* has committed an act of bankruptcy. Within a month after the making of the gift *N* is adjudicated bankrupt in England. *A* proves for a debt incurred in France and under French law by *N* to *A*. The relation of the trustee's title back, and the effect of such relation on the gift of *N* to *A*, is (semble) governed by English law (*lex fori*).

"creditors." Goudy, *Law of Bankruptcy in Scotland*, 2nd ed., p. 640, citing *Blackburn, Petr.*, Feb. 22, 1810, F. C. ; *Selkirk v. Davis*, 1814, 2 Rose, 291 ; *Ex parte Wilson*, 1872, L. R. 7 Ch. 490 ; *White v. Briggs*, 1843, 5 D. 1148.

¹ *Ex parte Melbourne*, 1870, L. R. 6 Ch. 64, 68, 69. Compare *Thurburn v. Steward*, 1871, L. R. 3 P. C. 478.

² *Ex parte Holthausen*, 1874, L. R. 9 Ch. 722. See especially, pp. 726, 727, judgment of James, L. J.

CHAPTER XXIX.

ADMINISTRATION AND DISTRIBUTION OF DECEASED'S MOVABLES.

(A) ADMINISTRATION.

RULE 178.¹ — The administration of a deceased person's movables² is governed wholly by the law of the country where the administrator acts, and from which he derives his authority to collect them,³ i. e., in effect, by the law of the country where the administration takes place (*lex fori*).⁴

Such administration is not affected by the domicile of the deceased.⁵

In this Rule, the term "administration" does not include distribution.

Comment.

"The established rule now is that in regard to creditors the "administration of assets of deceased persons is to be governed "altogether by the law of the country where the executor or "administrator acts, and from which he derives his authority to "collect them, and not by that of the domicile of the deceased."⁶

¹ *Story*, s. 524 ; *Westlake*, pp. 115, 116, 119-121 ; *Foote*, pp. 293-296. Mr. Foote does not absolutely agree with the Rule as here laid down. *Preston v. Melville*, 1840, 8 Cl. & F. 1 ; *In re Kloebe*, 1884, 28 Ch. D. 175.

² As to the devolution of a deceased person's immovables, see pp. 519, 520, *ante*, and note that in so far as such immovables, or lands, form part of the deceased's personal property or personal estate to be administered under an English grant, the "administration" (as contrasted with the "distribution" thereof) is governed by the same rules as the administration of his movables. In other words, all the assets of the deceased are, under an English administration, administered in accordance with the law of England.

³ *Story*, s. 424.

⁴ See as to principle that procedure is governed by the *lex fori*, chap. xxxi., p. 711, *post*.

⁵ Compare *Cook v. Gregson*, 1854, 2 Drew. 286, taken together with *In re Kloebe*, 1884, 28 Ch. D. 175, 176, 180, judgment of *Pearson*, J. But see *Foote*, pp. 293-295, and *Wilson v. Dunsany*, 1854, 18 Beav. 293.

⁶ *Story*, s. 524.

"Every administrator, principal¹ or ancillary,² must apply the "assets reduced into possession under his grant in paying all the "debts of the deceased, whether contracted in the jurisdiction "from which the grant issued or out of it, and whether owing to "creditors domiciled or resident in that jurisdiction or out of it, "in that order of priority, which according to the nature of the "debts or of the assets is prescribed by the law of the jurisdiction "from which the grant issued."³

This exposition of the law has received judicial approbation,⁴ and, in regard to an English administration, with which alone we are practically concerned, leads to the following results:—

First. The assets in the hands of the English administrator, wherever collected, are liable for all the debts of the deceased, whether incurred in England or a foreign country.⁵

Secondly. In the payment of creditors, all questions of priority are, it would seem, governed wholly by English law (*lex fori*).⁶

The principle of English law appears to be, that every question as to the order in which debts of different kinds are to be paid is a matter of procedure, and therefore to be determined in accordance with the *lex fori*,⁷ and hence that an English administrator, in reference to the assets which he is administering under an English grant, must follow the order of priority prescribed by English law; and this whether the creditor claiming payment be an English or a foreign, *e. g.*, a French, creditor.⁸

¹ A "principal administrator" means an administrator acting in or under the law of the country where the deceased person whose property is being administered died domiciled.

² An "ancillary administrator" means an administrator who is not a principal administrator.

³ *Westlake*, 3rd ed., p. 119.

⁴ *In re Kloebe*, 1884, 28 Ch. D. 175, 178, judgment of *Pearson*, J.

⁵ *In re Kloebe*, 1884, 28 Ch. D. 175, in which it was held that, in the administration of the English estate of a person dying domiciled abroad, foreign creditors were entitled to dividends *pari passu* with English creditors. Semble, there were in this case no foreign assets.

⁶ *In re Kloebe*, but compare *Foote*, pp. 293–295, where doubt is expressed as to the correctness of this statement; and also *Williams, Executors*, 9th ed., pp. 852–854.

⁷ See chap. xxxi., p. 711, *post*.

⁸ It has, however, been judicially suggested that, if French assets "were distributed [in France] so as to give French creditors, as such, priority in "distributing the English assets, the Court would be astute to equalise the payments, and take care that no French creditors should come in and receive "anything till the English creditors had been paid a proportionate amount." *In re Kloebe*, 1884, 28 Ch. D. 175, 177, judgment of *Pearson*, J.

A suggestion,¹ however, has been made that where the deceased has died domiciled abroad, and therefore the administration is an ancillary administration, the English administrator ought to look partly to the law of the deceased's domicile, in reference, at any rate, to debts there contracted; but there does not appear to be any sufficient authority in support of this view, which is opposed to the marked tendency of English Courts to determine all matters of procedure, in the most extensive sense of that term, in accordance with the *lex fori*.²

Thirdly. The principle that an English administrator must, in the administration of the deceased's estate, follow English law exclusively, applies, it would seem, only to assets which he holds as English administrator.

If, for example, he has in England assets collected in a foreign country, *e. g.*, Ireland, under an Irish grant, then these foreign assets should be dealt with in accordance with the law of Ireland. The same person in effect fills a twofold character, *viz.*, that of an English administrator and of an Irish administrator, and such Irish assets he holds and must administer as an Irish administrator.³

It must be borne in mind that the word "administration" is in this Rule not used in its most extensive sense: it here means simply the clearing of the deceased's estate from liabilities; it does not include the distribution of the residue or surplus which remains after the estate is cleared among the persons entitled to succeed beneficially thereto. This point is manifestly determinable in accordance with the rules governing the right of beneficial succession.⁴

Illustrations.

1. The deceased has died owing to *A*, an Englishman, a debt of £20, contracted in England, and to *B*, a Frenchman, a debt of £30, contracted in France. The assets in the hands of the deceased's English administrator are liable for both debts.⁵

2. The deceased owes £20 to *A* on an English judgment, and owes £20 to *B* on a Victorian judgment, which for this purpose is

¹ See *Foote*, pp. 293-295; and compare *Wilson v. Dunsany*, 1854, 18 Beav. 293; *Cook v. Gregson*, 1854, 2 Drew. 286. But *Wilson v. Dunsany* is disapproved. *In re Kloebe*, 1884, 28 Ch. D. 175, 180, judgment of *Pearson, J.*

² See chap. xxxi., Rule 188, p. 711, *post*.

³ *Cook v. Gregson*, 1854, 2 Drew. 286; and compare *In re Kloebe*, 1884, 28 Ch. D. 175, 178, judgment of *Pearson, J.*

⁴ See chap. xxx., p. 682, *post*.

⁵ *In re Kloebe*, 1884, 28 Ch. D. 175.

a simple contract debt. The £20 due on the English judgment must be paid by the English administrator to *A* in priority to the £20 due to *B* on the Victorian judgment.¹

8. The deceased, an Englishman residing in Venezuela, has executed an instrument to secure payment to *A* of £1,600. *A* afterwards registers the instrument in the form prescribed by the law of Venezuela, and by that law becomes thereby entitled to have his debt paid out of the general assets of *T* in priority to other creditors. This does not entitle *A* to priority of payment out of assets administered in England.²

(B) DISTRIBUTION.

RULE 179.³ — The distribution of the distributable residue of the movables of the deceased is (in general) governed by the law of the deceased's domicil (*lex domicilii*) at the time of his death.

Comment.

The ultimate aim of an administration⁴ (if that word be taken in its widest sense) is the due distribution by the administrator of the distributable residue of the deceased's assets among the persons entitled to succeed beneficially thereto.

Distribution, therefore, follows the appropriate rule as to succession, and the succession to, and therefore the distribution of, a deceased's movables is, whether he die intestate⁵ or testate⁶ (in general),⁷ governed by the law of his domicil at the time of his death.

¹ See *Cook v. Gregson*, 1854, 2 Drew. 286, together with *Harris v. Saunders*, 1825, 4 B. & C. 411.

² *Pardo v. Bingham*, 1868, L. R. 6 Eq. 485. But in this case the assets were equitable assets, and, further, *Romilly, M. R.*, seems to have been of opinion that the administration might be affected by the domicil of the debtor and creditor. "Unless both the debtor and the creditor were domiciled in Venezuela, I think that the registration of this document can only affect assets in Venezuela over which that country has power." *Ibid.*, p. 487, per *Romilly, M. R.* Whether domicil has any effect? Compare *Westlake*, p. 120.

³ See chap. xxx., *post*. As to the succession to or distribution of immovables in accordance with the *lex situs*, whether they form part of the deceased's real estate or personal estate, see pp. 519, 520, and p. 674, note 2, *ante*.

⁴ See pp. 312, 313–315, *ante*.

⁵ As to intestate succession, see chap. xxx., Rule 180, *post*.

⁶ As to testamentary succession, see chap. xxx., Rules 181 to 184, and compare Rules 185, 186, pp. 701, 702, *post*.

⁷ As to exceptions, none of which refer to intestate succession, see Exceptions 1 and 2 to Rule 182, *post*; Rule 184, p. 696, *post*, and Rules 185 to 187, *post*.

Meaning of law of domicil. — The law of the deceased's domicil in reference to succession means the rules applicable to succession in the case of the particular intestate or testator by the law of the country where he dies domiciled, which in the instance, for example, of an Englishman dying domiciled in a foreign country, need not be the same as the ordinary rules applicable to the case of succession to the property of native (*e. g.*, French) intestates¹ or testators.

Law at time of death. — The law which, as far as regards English Courts, governs the succession to a deceased's movables is the law of the deceased's domicil as it stands "at the time of his death;" and this qualification is of importance, for, if a change is made in that law after the death of the intestate or testator, the succession to, and therefore the distribution of, his movables in England is not affected by the change.²

Our Rule, in short, amounts to this: that English Courts will in general distribute the movables of a deceased person exactly as the Courts of his domicil would distribute them at the time of his death.

Question. — How is the duty of distribution to be performed when the deceased dies domiciled in a foreign country?

The distribution may be carried out either by the English administrator on his own authority, or by or under the direction of the Court (*e. g.*, where an administration action has been brought).

(1) *Distribution by administrator.* — When the deceased dies domiciled in a foreign country, *e. g.*, Victoria, the English administrator (who must in this case be an ancillary administrator) should, after payment of all debts and other claims proved in England, — assuming, of course, there is no administration action pending in England, — hand over the distributable residue to the personal representative of the deceased under the law of Victoria. This course is open to the English administrator,³ and, unless he takes the direction of the Court, is (it is conceived) his only safe course.

¹ See *Abd-ul-Messih v. Farra*, 1888, 13 App. Cas. 431. Compare *In Goods of Lacroix*, 1877, 2 P. D. 94; *Williams, Executors*, 9th ed., p. 1387, and 1 *Ibid.*, p. 304, cited p. 77, note 3, *ante*.

² *Lynch v. Government of Paraguay*, 1871, L. R. 2 P. & D. 268; *In re Aganoor's Trust*, 1895, 64 L. J. Ch. 521; *Story*, 7th ed., s. 481.

³ See *Westlake*, p. 116; *Eames v. Hacon*, 1880, 16 Ch. D. 407; 1881, 18 Ch. D. (C. A.) 347; *Re Kloebe*, 1884, 28 Ch. D. 175; *De Mora v. Concha*, 1885, 29 Ch. D. (C. A.) 268, especially 284, observation of *Fry*, L. J.; *Re Trufort*, 1887, 36 Ch. D. 600, 611, judgment of *Stirling*, J.; *In re De Penny*, [1891]

(2) *Distribution by Court.* — The Court may at its discretion adopt either of two different methods of distribution.

The Court may, on the one hand, hand over the distributable residue to the personal representative of the deceased under the law of his domicile, and leave to such representative the distribution thereof among the beneficiaries. If this course is taken, all persons who, whether as next of kin or otherwise, claim a share in the deceased's estate, must enforce their claims before the tribunals of his domicile.¹

The Court may, on the other hand, determine for itself what is the law of the deceased owner's domicile, and who are the persons who in accordance with such law are entitled to succeed to the deceased's movables, and, having determined this, distribute in accordance with such law, the distributable residue remaining in the hands of the English administrator.²

2 Ch. 63, 68, judgment of *Chitty, J.*; *Ewing v. Orr Ewing*, 1885, 10 App. Cas. 453, especially pp. 502–504, 509, 510, and pp. 463, 464, note; 2 *Williams, Executors*, 9th ed., pp. 1525, 1526.

The English administrator cannot rightly or safely undertake on his own responsibility to distribute the surplus directly among the persons entitled thereto under the law of Victoria. An administrator would in cases of difficulty obtain the direction or sanction of Court. See, *e. g.*, R. S. C. Ord. LV. rr. 3, 4.

¹ See especially, *Enohin v. Wylie*, 1862, 10 H. L. C. 1, 13, 14; 31 L. J. Ch. 402, 405, 406. Compare *Eames v. Hacon*, 1880, 16 Ch. D. 407; 1881, 18 Ch. D. (C. A.) 347. This, according to Lord Westbury, is the course which the Courts *must* take; and, though his view that the Courts of the domicile have exclusive jurisdiction must now be considered overruled (*Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34, 39; 1885, 10 App. Cas. 453, 502, 504), yet the course recommended by him is still open to the Court. Compare *Westlake*, 3rd ed., p. 117: "Where there is an action for administration in England, it is doubtful whether the Court will insist on carrying that action out to its full completion, by distributing the surplus with such light as it can obtain on the law of the deceased's foreign domicile, or will hand over the surplus to a representative of the deceased in the domicile." *Ibid.*

² The right of the Court to pursue this course was apparently disputed by Lord Westbury (see *Enohin v. Wylie*, 1862, 10 H. L. C. 1, 12). But his view has not obtained acceptance. *Ibid.*, p. 19, judgment of Lord Cranworth; pp. 23, 24, judgment of Lord Chelmsford; and *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34, 39, judgment of Selborne, Ch.

AMERICAN NOTES.

CHAPTER XXIX.

ADMINISTRATION AND DISTRIBUTION OF DECEASED'S MOVABLES.

1. (Rule 178.) **ADMINISTRATION.** — The administration of the assets of deceased persons is governed exclusively by the law of the place where the executor or administrator acts, and from which he derives his authority. *Jones v. Drewry*, 72 Ala. 311, 316; *Clark v. Butler*, 4 Demarest, 378; *Duffy v. Smith*, 1 Demarest, 202; *Hoskins v. Sheddon*, 70 Ga. 528; *Wharton, Conf. of L.* s. 624; 2 *Williams on Executors*, 7th Am. ed., Randolph & Talcott's notes, pp. 925-927. See *Reynolds v. Stockton*, 140 U. S. 254; 11 Sup. Ct. 773. But where assets are illegally brought from the jurisdiction of the domicile, in which no administrator has been appointed, into another jurisdiction, the Courts of the latter may recognise a priority given to a creditor by the law of the former jurisdiction. *Hardenberg v. Manning*, 4 Demarest, 437. As to ancillary administration, see *Emery v. Batchelder*, 132 Mass. 452; *Hamilton v. Carrington* (S. C.), 19 S. E. 616; *Hopper v. Hopper*, 125 N. Y. 400; 26 N. E. 457; *Duffy v. Smith*, 1 Demarest, 202; *Leach v. Buckner*, 19 W. Va. 36; *Succession of Gaines*, 45 La. An. 1237; 14 So. 233; *Dickey v. Vann*, 81 Ala. 425; *Welch v. Adams*, 152 Mass. 74; 25 N. E. 34.

As to the administration of insolvent estates, see 2 *Williams on Executors*, 7th Am. ed., Randolph & Talcott's notes, pp. 252-255; also, vol. iii., p. 135 n. A creditor of the domicile of a deceased insolvent, who has received on his claim a larger percentage than creditors of the place of ancillary administration, will not be permitted to take from creditors of the latter place assets there situate, without accounting for what he has already received. *Hays v. Cecil*, 16 Lea, 160.

2. (Rule 179.) **DISTRIBUTION.** — That the distribution of the residue of the movables of a deceased person is in general governed by the law of his domicile, see 2 *Williams on Executors*, 7th Am. ed., Randolph & Talcott's notes, pp. 925-927; *Welch v. Adams*, 152 Mass. 74; 25 N. E. 34; *Hutton v. Hutton*, 40 N. J. Eq. 461; *Van Gieson v. Banta*, 40 N. J. Eq. 14; *Cooper v. Beers*, 143 Ill. 25; *Apple's Estate*, 66 Cal. 432; *Matter of Braithwaite*, 19 Abb. N. Cas. 113; *McNamara v. McNamara*, 62 Ga. 200; *White v. Tennant*, 31 W. Va. 790; 8 S. E. 596; *Brewer v. Cox* (Md.), 18 Atl. 864; *In re Afflick*, 3 McArthur, 95; *Knapp v. Knapp*, 95 Mich. 474.

Whether the Courts at the place of ancillary administration will distribute a residue of the assets there situate, or will direct it to be remitted for distribution to the place of principal administration, is a matter of discretion. *Harvey v. Richards*, 1 Mason, 381; *Welch v. Adams*, 152 Mass. 74; 25 N. E. 34; *Graveley v. Graveley*, 25 S. C. 1; *O'Reilly v. New York & N. E. Co.* (R. I.) 19 Atl. 244; *Welles' Estate*, 161 Pa. St. 218; 28 Atl. 116; 34 W. N. C. 327;

Succession of Gaines, 45 La. An. 1237 ; 14 So. 233 ; *Matter of Braithwaite*, 19 Abb. N. Cas. 113. The usual course, where domestic claimants have been satisfied, is to direct the residue to be transmitted to the place of principal administration. *Barry's Appeal*, 88 Pa. St. 131. See 1 *Williams on Executors*, 7th Am. ed., Randolph & Talcott's notes, pp. 442-445. But the Court of ancillary administration may, in so doing, require security of the domiciliary administrator, *Hamilton v. Levy* (S. C.), 19 S. E. 610 ; or it may determine, in accordance with the law of decedent's domicile, the validity of a claim to a legacy. *Clark v. Butler*, 4 Demarest, 378.

The Code of Mississippi, 1880, s. 1270, provides that all personal property "situated" in that State shall descend and be distributed according to the laws thereof regulating the descent and distribution of such property, without regard to the domicile of the deceased. This provision has been held to apply only to tangible property, and not to choses in action owned by a non-resident and not connected with any business conducted in the State, and hence not to embrace money deposited in Mississippi banks, or a note secured on land there, the deposit certificates and books, and the mortgage note, being found at the foreign domicile of the intestate, who had no creditors or heirs in Mississippi, *Speed v. Kelly*, 59 Miss. 47 ; nor to include an insurance policy, issued and payable in New York, on the life of a person domiciled in Virginia, though the policy was deposited for safe-keeping with a person in Mississippi. *Mayo v. Assurance Society*, 71 Miss. 590. See *Jahier v. Rascoe*, 62 Miss. 699. See also, *Channel v. Chapen*, 46 Ill. App. 234.

CHAPTER XXX.

SUCCESSION TO MOVABLES.

(A) *INTESTATE SUCCESSION.*

RULE 180.¹ — The succession to the movables² of an intestate is governed by the law of his domicile at the time of his death, without any reference to the law of the country where

- (1) he was born, or
- (2) he died, or
- (3) he had his domicile of origin, or
- (4) the movables are, in fact, situate at the time of his death.

Comment.

“The rule is, that the distribution of the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard whatsoever to the place either of the birth or the death [or the domicile of origin], or the situation of the property at that time.”³ “The universal doctrine, now recognised by the common law, although formerly much contested, is, that the succession to personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his death.”⁴ . . . It is of no consequence what is the country of the

¹ See 2 *Williams, Executors*, 9th ed., p. 1387; *Story*, ss. 480–481 a; *Bruce v. Bruce*, 1790, 6 Bro. P. C. 566; *Somerville v. Somerville*, 1801, 5 Ves. 749 a; *Stanley v. Bernes*, 1831, 3 Hagg. Ecc. 373; *Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301.

² Note the difference between “movables” and “personalty;” pp. 71–73, *ante*. Chattels real are not included in movables; they are immovables, and devolve in the case of intestacy in accordance with the *lex situs* (see Rule 138, p. 516, *ante*), i. e., in accordance with the Statute of Distribution, 22 & 23 Car. II. cap. 10; *Duncan v. Lawson*, 1889, 41 Ch. D. 394.

³ 2 *Williams, Executors*, 9th ed., p. 1387.

⁴ For meaning of “law of domicile at time of death,” compare p. 678, and p. 77, note 3, *ante*.

"birth of the intestate, or of his former domicil, or what is the actual *situs* of the personal property at the time of his death; "it devolves upon those who are entitled to take it, as heirs or distributees, according to the law of his actual domicil at the time of his death."¹

Illustrations.

1. A French subject dies intestate and domiciled in England. Succession to his movables is governed by the English Statute of Distribution, without any reference to the law of France.

2. A British subject domiciled in France dies intestate in London. The succession to the furniture of his house in London is governed by the rules which regulate in France succession to the movables of a British subject dying domiciled in France.

3. An Englishman domiciled in Scotland, but residing in England, dies in England intestate, and leaves there money and other goods. The deceased whilst domiciled in Scotland had a son, *A*, by *M*, and afterwards, being still domiciled in Scotland, married *M*, whereby *A* is under Scotch law legitimated. At the time of the intestate's death *M* is dead, and *A* is the intestate's only surviving relative. *A* is entitled to succeed to the money and goods in England.²

4. A British subject domiciled in Portugal dies there intestate, leaving no relative except *A*, an illegitimate son, who by Portuguese law is entitled to succeed to the intestate's property. The intestate leaves movables in England. *A* is entitled to succeed to the movables.³

5. *N*, a Scotchman domiciled in Scotland, after the birth of *A*, his illegitimate son, has married *A*'s mother, whereby *A* is legitimated under Scotch law. *N*, though domiciled in Scotland until the time of his marriage, acquires after the marriage an English domicil, and at his death is domiciled in England, where he leaves goods. *N* dies intestate in England after the death of his wife,

¹ *Story*, s. 481. The terms "personal estate" and "personal property" must in these quotations be taken as equivalent to movables. See *Freke v. Carbery*, 1873, L. R. 16 Eq. 416; *In Goods of Gentili*, 1875, Ir. Rep. 9 Eq. 541.

² See *In re Goodman's Trusts*, 1881, 17 Ch. D. (C. A.) 266; *Dalhousie v. McDouall*, 1840, 7 Cl. & F. 817; *Vaucher v. Solicitor to Treasury*, 1888, 40 Ch. D. (C. A.) 216. As to legitimation, see Rule 134, p. 497, *ante*. Whether *A* would be entitled to succeed to English chattels real of intestate? See pp. 506, 507, *ante*.

³ *Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301.

and leaves no surviving relative except *A*. *A* is entitled to succeed to the goods.¹

6. A British subject dies intestate domiciled in Paraguay, leaving movables in England. At the time of the intestate's death *A* is, under the law of Paraguay, entitled to succeed to the intestate's property. After the intestate's death the legislature of Paraguay changes the rules as to succession so that, under the changed law of Paraguay, *A* is not entitled to succeed to the intestate's property. After the change of the law in Paraguay, *A* claims in our Courts to succeed to the intestate's movables in England. *A* is entitled to succeed to the movables.²

(B) TESTAMENTARY SUCCESSION.

(i) *Validity of Will.*

RULE 181.³—Any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid.⁴

Comment.

The general principle which governs testamentary no less than intestate succession is, that the law of the country in which the deceased was domiciled at the time of his death governs the distribution of and the succession to his movables, and therefore decides what constitutes his last will, and whether and how far it is valid; and this without regard to the place either of his birth or of his death, or to the situation of the movables at the time of

¹ See *In re Goodman's Trusts*, 1881, 17 Ch. D. (C. A.) 266. See chap. xx., Rule 134, p. 497, *ante*.

² See *Lynch v. Government of Paraguay*, 1871, L. R. 2 P. & D. 268; *In re Aganoor's Trust*, 1895, 64 L. J. Ch. 521; and p. 678, *ante*.

³ 1 *Williams, Executors*, 9th ed., pp. 300–310.

⁴ *I. e.*, of course in England. A will, however, may occasionally, though valid as a will, be not a good execution of a power. See Rules 185 to 187, pp. 701–704, *post*; and *In re Kirwan's Trusts*, 1883, 25 Ch. D. 373.

A conceivable exception to this Rule is a bequest, held valid by the law of the testator's domicile, for the promotion in England of some object opposed to the policy of the law of England. Such a bequest would, it is submitted, be here invalid. But the imagined case can hardly arise, as such a bequest would almost certainly be held invalid by the Courts of the testator's domicile. See, however, *Mayor of Canterbury v. Wyburn*, [1895] A. C. 89, compared with *Attorney-General v. Mill*, 1831, 2 Dow. & C. 393.

his death. This principle, which is to a certain extent modified¹ when the Courts have to decide how far a will is invalid here on account of grounds of invalidity arising from the law of the testator's domicile, is fully carried out in reference to wills valid by that law. The object of our Courts is to deal with such a will exactly as the Courts of the domicile would deal² with it at the time of the testator's death.³ Hence, on the one hand, if the deceased is a foreigner dying domiciled in England though resident abroad, the will, if it is good according to English law, will be held valid here, without reference to the law of the country to which he belongs by nationality, or where he is resident; and, on the other hand, if the deceased is a person resident whether in England or abroad, but domiciled in a foreign country, our Courts will hold valid any will of movables good by the law of the country, *e. g.*, France, where the testator is domiciled.⁴

When once the rights of the parties, under the will of a testator who died domiciled in a foreign country, are determined by the Courts of that country, English tribunals, as elsewhere pointed out,⁵ are bound by and follow the decision of the foreign Court.⁶

Illustrations.

1. A married woman domiciled in Spain makes a will of movables situate in England. By the law of Spain she is capable of making a will and her will is good. The will is valid here.⁷

2. A Frenchman, domiciled in France but resident in England, makes a will of movables in the form required by English law. The French Courts hold it valid as being made in accordance with the *lex actus*, or, in other words, in accordance with the forms required by the law of the place of execution. The will is valid.⁸

3. A Frenchman domiciled in France makes a holograph will

¹ See Exceptions 1 and 2, pp. 690, 693, *post*, and Rule 184, p. 696, *post*.

² See *Abd-ul-Messih v. Farra*, 1888, 13 App. Cas. 431; and compare *In Goods of Dost Aly Khan*, 1880, 6 P. D. 6.

³ See *Lynch v. Government of Paraguay*, 1871, L. R. 2 P. & D. 268; *In re Aganoor's Trust*, 1895, 64 L. J. Ch. 521; and p. 678, *ante*.

⁴ Compare as to meaning of term "law of a country," Intro., pp. 5-7, *ante*, and chap. i., pp. 75-77, *ante*.

⁵ See pp. 431, 432, *ante*.

⁶ See 1 *Williams, Executors*, 9th ed., pp. 305-307; *Laneville v. Anderson*, 1860, 2 Sw. & Tr. 24; *Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301; *In re Trufort*, 1887, 36 Ch. D. 600.

⁷ *In Goods of Maraver*, 1828, 1 Hagg. Ecc. 498; *Story*, s. 465.

⁸ See *In Goods of Lacroix*, 1877, 2 P. D. 94.

of movables valid by the law of France, but not conforming to the provisions of the English Wills Act, and thereby leaves the furniture of his house in England to A. The will is valid.

4. A testator domiciled in Ireland makes a will leaving money in the English funds to A, upon trusts as to accumulation which are prohibited by the Thellusson Act, 39 & 40 Geo. III. cap. 98, which, however, does not extend to Ireland. The will is valid.¹

5. A testator domiciled in Victoria bequeaths money to an English corporation for the purchase of land in England for a charitable purpose. Such a bequest, if made by a person domiciled in England, would be invalid. Whether the validity of the bequest is governed wholly by the law of Victoria (*lex domicilii*), and the will is valid?²

(ii) *Invalidity of Will.*

RULE 182. — Any will of movables which is invalid according to the law of the testator's domicil at the time of his death on account of

- (1) the testamentary incapacity of the testator,³ or
- (2) the formal invalidity of the will (*i. e.*, the want of the formalities required by such law),⁴ or
- (3) the material invalidity of the will (*i. e.*, on account of its provisions being contrary to such law),⁵

¹ See *Freke v. Carbery*, 1873, L. R. 16 Eq. 461. Compare *De Fogassieras v. Dupont*, 1881, 11 L. R. Ir. 123; *In Goods of Gentili*, 1875, Ir. Rep. 9 Eq. 541.

² *Mayor of Canterbury v. Wyburn*, [1895] A. C. 89. Contrast, however, *Attorney-General v. Mill*, 1831, 2 Dow. & C. 393.

Whether the bequest is valid or not depends on the character of the Mortmain Acts in so far as they refer to bequests for the purchase of land. If these Acts, as held by the Privy Council (*Mayor of Canterbury v. Wyburn*), simply place a limit on the freedom of death-bed gifts, they do not apply to persons not domiciled in England, and the bequest is valid. But if these Acts, as seems to have been hitherto assumed (*Attorney-General v. Mill*; *Westlake*, 3rd ed., p. 191; *Story*, s. 446), check the placing of English land in mortmain, then the bequest, as it affects English land, is governed by the *lex situs* and invalid.

³ *In Goods of Maraver*, 1828, 1 Hagg. Ecc. 498; *Story*, s. 465, citing *Lawrence v. Kittridge*, 21 Conn. 582 (Am.).

⁴ 1 *Williams, Executors*, 9th ed., pp. 300–310; *Craigie v. Lewin*, 1843, 3 Curt. 435; *De Zichy Ferraris v. Hertford*, 1843, 3 Curt. 468, 486; *Bremer v. Freeman*, 1857, 10 Moore P. C. 306; *Enohin v. Wylie*, 1862, 10 H. L. C. 1; 31 L. J. (Ch.) 402.

⁵ *Whicker v. Hume*, 1858, 7 H. L. C. 124; 28 L. J. (Ch.) 396; *Thornton v. Curling*, 1824, 8 Sim. 310; *Campbell v. Beaufoy*, 1859, Johns. 320. Compare *Westlake*, 3rd ed., p. 105.

is (subject to the exceptions hereinafter mentioned, and to the effect of Rule 184)¹ invalid.

Comment and Illustrations.

Testamentary incapacity of testator.

A will executed by a testator who is under an incapacity, *e. g.*, on account of minority, by the law of his domicile, will not be held valid in England. Clause 1 of our Rule is not affected by the Wills Act, 1861 (24 & 25 Vict. cap. 114),² ss. 1 and 2, and applies as well to British subjects as to aliens.³

1. Testator is domiciled in a country where the age of majority is 25, and where a minor cannot make a will. He, when resident but not domiciled in England, makes a will of movables at the age of 22 and dies. The will is invalid.

2. An Englishman, domiciled in England but living in Virginia, makes a will when 19 years of age. The will, though valid by the law of Virginia, is invalid here, on the ground that an infant is incapable of making a will.⁴

Formal invalidity of will.

A will, though made by a person capable of making it, may nevertheless be invalid for want of some formal requisite, *e. g.*, signature by the testator, attestation by the required number of witnesses, and so forth. It may, in short, be defective for want (to use the terms of English law) of due execution. Such a defect constitutes a formal invalidity.

The question whether a will is duly executed, or, in other words, whether it is or is not formally valid, must be determined in accordance with the law of the testator's domicile. In cases, in short, of testamentary disposition, as in cases of intestate succession, the rule of our Courts (though subject now, as regards formal validity, to considerable exceptions⁵) is to look to the law of the testator's domicile. This, it should carefully be noted, is still the

¹ *I. e.*, Rule as to effect of change of domicile after execution of will. See p. 696, *post*.

² These sections are reproduced in Exceptions 1 and 2, pp. 690, 693, *post*. But see Rule 184, p. 696, *post*.

³ *In Goods of Maraver*, 1828, 1 Hagg. Ecc. 498; *Story*, s. 465.

⁴ *Revised Code of Virginia*, 224, cited 4 *Kent*, 12th ed., p. 506, note (e).

⁵ See Exceptions 1 and 2, pp. 690, 693, *post*.

rule. It applies to all wills, whether of British subjects or of aliens, which, for whatever reason, do not fall within the exceptions to Rule 182.¹

1. An American citizen domiciled at New York, but resident in England, makes his will while in England, according to the formalities required by the English Wills Act. The will is invalid, according to the law of New York, for want of publication.² His will is invalid.

2. An American citizen, domiciled at New York, executes when in France a holographic will, valid by the law of France, but not attested as required by the law of New York. He leaves movable property in England. His will is invalid.

3. A British subject born in the Mauritius, but whose parents were at the time of his birth domiciled in France, comes to England and acquires an English domicile. He, whilst in London, executes a will of movables in England, according to the forms required by the law of Mauritius, but not according to the English Wills Act. The will is invalid.³

4. A naturalized British subject is resident in England, but his domicile of origin is in one of the United States. He retains his American domicile, and whilst on a visit to the Continent makes a will, which is executed in accordance with the formalities required by the English Wills Act, but not in accordance with the formalities required either by the law of the testator's domicile, or by the law of the country where the will is made. The will is invalid.⁴

Material invalidity.

A will made by a person under no testamentary incapacity⁵ and duly executed or formally valid⁶ may nevertheless be invalid, or wholly or in part inoperative, because it contains provisions to which the law will not give effect. Thus, English law prohibits bequests upon trust for accumulation beyond certain

¹ See, e. g., *In Goods of Lacroix*, 1877, 2 P. D. 94; but note that the "law of the testator's domicile" means, as already explained (see p. 77, note 3, and p. 678, *ante*), the law or rule applicable to the particular case.

² See 4 *Kent*, 12th ed., p. 515, note (b).

³ Remark that this will does not come within Exception 1, p. 690, *post*, nor within Exception 2, p. 693, *post*.

⁴ Such a will, being invalid by the law of the testator's domicile, falls within Rule 182, p. 686, *ante*, and does not fall within either of the Exceptions to it. See App., Note 15, *The Wills Act, 1861*. See, as further illustration, *In Goods of Gatti*, 1879, 27 W. R. 323, and contrast *In re Gally*, 1876, 1 P. D. 438.

⁵ See p. 687, *ante*.

⁶ *Ibid*.

periods ; ¹ the law of France, ² as of Scotland, ³ invalidates bequests of more than a certain proportion of the testator's property in derogation of the rights of his widow or children ; the law of Louisiana makes void a bequest for charitable purposes to an unincorporated body of persons. ⁴ Such invalidity, arising from the nature of the bequest, is termed *material* or *intrinsic* invalidity, and whether a will is or is not void wholly or in part on account of such material or intrinsic invalidity depends upon the law of the country where the testator is domiciled. Thus, where a British subject domiciled in France made a disposition of his movable property which, though valid by the law of England, was invalid by the law of France, the will was held inoperative. ⁵

Nor is the effect of the material invalidity of a will affected, at any rate where there is no change of domicile, by the Wills Act, 1861, 24 & 25 Vict. cap. 114. ⁶ That Act renders formally valid, and therefore admissible to probate, a will which might otherwise be bad for defects of form ; but even when a will has been admitted to probate in solemn form, and therefore must be held not defective as to its formal requisites, it is, in so far as its provisions contravene the law of the testator's domicile, treated here as inoperative, and the persons obtaining probate will be held by the Courts to be trustees for those who would be entitled to succeed to deceased's property if (as far as the inoperative provisions go) he had died intestate.

Where a will was admitted to probate in solemn form, but there was a doubt whether the provisions were valid according to the testator's *lex domicilii*, the law was thus laid down :—

“ A probate is conclusive evidence that the instrument proved
“ was testamentary according to the law of this country. But it
“ proves nothing else. That may be illustrated in this way : Sup-
“ pose there was a country in which the form of a will was exactly
“ similar to that in this country, but in which no person could give

¹ The Thellusson Act, 39 & 40 Geo. III. cap. 98.

² See *Thornton v. Curling*, 1824, 8 Sim. 310.

³ Conf. *Bell, Principles of Law of Scotland*, 9th ed., ss. 1579, 1582, 1592.

⁴ *Macdonald v. Macdonald*, 1872, L. R. 14 Eq. 60. See Scotch case, *Boe v. Anderson*, 1862, Ct. of Sess. Rep., 2nd ser., xxiv., p. 732.

⁵ *Thornton v. Curling*, 1824, 8 Sim. 310 ; *Campbell v. Beaufoy*, 1859, Johnson, 320. See *Whicker v. Hume*, 1858, 7 H. L. C. 124, 156, 157.

These cases were no doubt decided in reference to the law as it stood before 1861, but (at any rate when there is no change of domicile) the Wills Act, 1861, does not, it is submitted, affect the matter.

⁶ See Rule 184, p. 696, *post*, and App., Note 15, *The Wills Act, 1861*.

"away more than half his property. Such an instrument made in that country by a person there domiciled, when brought to probate here, would be admitted to probate as a matter of course. Probate would be conclusive that it was testamentary, but it would be conclusive of nothing more; for after that there would arise the question, how is the Court that is to administer the property to ascertain who is entitled to it? For that purpose you must look beyond the probate to know in what country the testator was domiciled, for by the law of that country the property must be administered. Therefore, if the testator, in the case I have supposed, had given away all his property, consisting of £10,000, it would be the duty of the Court that had to construe the will to say £5,000 only can go according to the direction in the will; the other £5,000 must go in some other channel." ¹

1. A British subject domiciled in England, but resident in France, makes a will leaving his movable property to trustees upon trusts for accumulation beyond the period allowed by the Thellusson Act. The will, in whatever form it is made, is as regards such trusts invalid. ²

2. A British subject domiciled in France makes a will while in England containing provisions in contravention of French law. The will is made in the form required by French law. It is here, as regards such provisions, inoperative and invalid. ³

Exception 1. ⁴ — Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either

[1] by the law of the place where the same was made, or

[2] by the law of the place where such person was domiciled when the same was made, or

[3] by the laws then in force in that part [if any] ⁵ of Her Majesty's dominions where the testator had his domicile of origin.

¹ *Whicker v. Hume*, 1858, 7 H. L. C. 124, 156, 157, judgment of *Cranworth*, Ch. Conf. judgment of Lord *Wensleydale*, *Ibid.*, 165, 166.

² *Freke v. Carbery*, 1873, L. R. 16 Eq. 461.

³ *Thornton v. Curling*, 1824, 8 Sim. 310.

⁴ The Wills Act, 1861 (24 & 25 Vict. cap. 114), s. 1. See App., Note 15, *The Wills Act, 1861*.

⁵ See *In Goods of Lacroix*, 1877, 2 P. D. 94. The expression "Her Majesty's dominions" is of course equivalent to "British dominions" as defined p. 65, *ante*.

Comment and Illustrations.

This Exception is (except the figures and words in square brackets) given in the precise terms of the Wills Act, 1861 (24 & 25 Vict. cap. 114), s. 1; the words "if any," suggested by *In Goods of Lacroix*,¹ are added for the sake of clearness.

It will, however, be observed that part of the Exception² refers to cases in which there may have been a change of domicile between the execution of the will and the death of the testator, and therefore are not, strictly speaking, within an Exception to Rule 182. The effect of the terms referring to a change of domicile is considered in the comment upon Rule 184.

A will to come within this Exception must be, first, a will "made out of the United Kingdom;"³ secondly, a will "made by a British subject," who may be either a natural-born or a naturalized⁴ British subject; thirdly, a will of "personal estate." The term "personal estate," as already pointed out,⁵ is not synonymous with "movables;" for, though personal estate includes (with insignificant exceptions) all movables, it also, when used with technical correctness, includes interests in land, which belong to the class of immovables. What is the sense in which the term is used in the Wills Act, 1861,⁶ and therefore in Exceptions 1⁷ and 2,⁸ is open to question. Probably, however, "personal estate" is to be understood in the Act, and therefore in the Exceptions, as equivalent to movables, and as not including interests in land.⁹

When the above three conditions are fulfilled, a will (though not executed according to the form required by the law of the testator's domicile at the time of his death) will be held to be "well executed for the purpose of being admitted to probate" (*i. e.*, will be held formally valid), if executed according to any of the forms specified in the Exception.

The following examples illustrate the effect of the Exception as

¹ 1877, 2 P. D. 94.

² *Viz.*, the words in the parenthesis and clause 2.

³ For meaning of "United Kingdom," see p. 65, *ante*.

⁴ *In Goods of Gally*, 1876, 1 P. D. 438.

⁵ See pp. 72, 73, *ante*.

⁶ 24 & 25 Vict. cap. 114.

⁷ See p. 690, *ante*.

⁸ See p. 693, *post*.

⁹ This conclusion is by no means certain, but is suggested by the general scope of the Act.

regards wills of British subjects where there has been no change of domicile since the execution of the will : —

A British subject domiciled in England goes for a few hours to Boulogne. Whilst there he executes a will of all his movable property, in accordance with the forms required by the law of France. The will, though not conforming to the Wills Act, 1837, 7 Will. IV. & 1 Vict. cap. 26, is valid.

A British subject domiciled in Germany is a native of the Mauritius, where he has his domicile of origin. Whilst travelling in Denmark, he makes a will of all his movable property, according to the form required by the law of the Mauritius. The will is valid here, even though not made in accordance with the forms required either by the law of the testator's domicile (Germany) or by the law of the country (Denmark) where the will is made.

As the Wills Act, 1861, 24 & 25 Vict. cap. 114, does not invalidate¹ a will made in any form which would be valid independently of the Act, a British subject can still make a valid will of movables by following the form required by the law of his actual domicile. Hence it may happen that a British subject possibly has, when residing out of the United Kingdom, a choice of three different forms, according to any one of which he may make a will of movables which will be held, as far as form goes, valid in England. Thus, a British subject born of Canadian parents has a Canadian domicile of origin, and is actually domiciled in Germany. At the moment of making his will he is travelling in Italy. He may make a valid will of movables in any one of three different forms, viz., the German form (*lex domicilii*), the Italian form (*lex actus*), the Canadian form (*lex domicilii originis*).

If, however, the testator is a *naturalized* British subject, his will, if made only in accordance with the form required by the law of the place where he has his domicile of origin, may very well turn out to be invalid. The testator, for example, is a Frenchman whose domicile of origin is French. He becomes a British subject by naturalization. He is domiciled in Massachusetts, and is resident at Berlin, where he makes his will in accordance with the forms required by the law of the place where he has his domicile of origin, viz., France, but not in accordance with the forms required by the

¹ "Nothing in this Act contained shall invalidate any will or other testamentary instrument, as regards personal estate, which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act." The Wills Act, 1861, s. 4.

law of Prussia. The will is invalid. It is not made according to the forms required by the law of the country where the testator is domiciled, viz., Massachusetts. It is not made according to forms required by the law of the place where it is made, viz., Prussia. It is made according to the forms required by the law of the place where the testator has his domicile of origin, viz. France, but this place is not "part of Her Majesty's dominions."

If, indeed, the law of Massachusetts held such a will valid when made by a British subject,¹ it might be good as being made in accordance with the testator's *lex domicilii*; but it may pretty confidently be assumed that the Courts of Massachusetts would not hold the will valid, and that, therefore, it would neither under Rule 181,² nor within Exception 1, be held valid in England.

*Exception 2.*³—Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Comment.

This Exception reproduces verbatim the Wills Act, 1861 (24 & 25 Vict. cap. 114), s. 2. It will be noted that the words in parenthesis refer to cases where there may have been a change of domicile between the execution of the will and the death of the testator, and therefore are not strictly speaking within an Exception to Rule 182. The effect of the terms referring to a change of domicile is considered in the comment upon Rule 184.

A will within this Exception must be: first, a will "made within the United Kingdom;" secondly, the will of a "British subject;" thirdly, a will of "personal estate."⁴ If these conditions are satisfied, a will (though not duly executed according to the law of the testator's domicile) will be held to be well executed,

¹ See *In Goods of Lacroix*, 1887, 2 P. D. 94, where a will made by a Frenchman, naturalized in England but domiciled in France, was, though made in the English form, held valid on the ground that the French Courts held such a will good in the case of a British subject.

² See p. 684, *ante*.

³ 24 & 25 Vict. cap. 114, s. 2. See App., Note 15, *The Wills Act, 1861*; note that "United Kingdom" does not include the Isle of Man or the Channel Islands; see p. 65, *ante*.

⁴ See p. 691, *ante*.

and will be admitted to probate (*i. e.*, will be held formally valid), if executed "according to the forms required by the laws for the "time being in force in that part of the United Kingdom where "the same is made." Thus, a British subject may, when within the United Kingdom, make a will of movables which is to be held duly executed if he makes it either according to the form required by the law of the country where he is domiciled, *e. g.*, Mauritius, or according to the form required by the law of the country where the will is made, *e. g.*, Scotland.

A will, it should be noticed, which falls within either Exception 1 or Exception 2, though it must be held by an English Court to be duly executed, or free from any formal defect, may still, as before the Act of 1861, be invalid, either because the testator is, according to the law of his domicile, incapable¹ of making a will, or because the will is materially invalid or inoperative as containing provisions contravening the law of the testator's domicile.

SUB-RULE. — The law of a deceased person's domicile at the time of his death, in general, determines whether, as to his movables, he does or does not die intestate.

Comment.

This Sub-Rule is an immediate result of the principle that the validity of a will² is in general determined by the law of a testator's domicile. A French subject dies domiciled in England, leaving an unattested testamentary document, written wholly in his own hand and signed by himself. At the moment of executing it he is resident in Paris; he leaves no other will. Our Courts will decide, looking wholly to ordinary English law, that the document is not a will, *i. e.*, that the deceased has died intestate. If, on the other hand, the testator had died in England but domiciled in France, and the document had been executed in England, our Courts would, in deciding whether it constituted a will or not, have looked wholly to French law. In either case, therefore, whether the testator does or does not leave a valid will, or in other words, whether he does or does not die intestate, is determined by our Courts in accordance with the law of the deceased's domicile.

The effect, however, of Exceptions 1 & 2 to Rule 182,³ and of

¹ See Rule 182, p. 686, *ante*.

² See Rule 181, p. 684, *ante*, and Rule 182, p. 686, *ante*, and compare Rule 180, p. 682, *ante*.

³ See pp. 690, 693, *ante*.

Rule 184,¹ or, in other words, of the Wills Act, 1861, 24 & 25 Vict. cap. 114, occasionally is, that wills are held valid by our Courts though not made in accordance with the testator's *lex domicilii*, or, in other words, that a deceased person is held by English Courts to have died testate who, according to the law of his domicile at the time of his death, has died intestate.

(iii) *Interpretation of Will.*

RULE 183.— Subject to the exception hereinafter mentioned, a will of movables is (in general) to be interpreted with reference to the law of the testator's domicile at the time when the will is made.

Comment.

This Rule bears upon two different cases:—

First. Where the testator uses technical terms of law, which have a definite meaning attached to them by the law of his domicile, his will must be interpreted with reference to such law.

Secondly. Where he has used terms the meaning of which is not governed by a rule of law, such as names of measures, weights, money, etc., it is reasonable to presume,² in the absence of ground to the contrary, that he meant the measures, weights, etc., known by these names in the country where he was domiciled.

Except, however, in the cases in which the construction of a will is governed by an absolute rule of law, the maxim, that the terms of a will should be construed with reference to the law of the testator's domicile, is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country.

Exception.— Where a will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will should be construed with reference to the law of that country.

Comment.

There are at least two different cases to which the principle of this Exception applies:³—

¹ See p. 696, *post*.

² See Intro., General Principle No. VI., p. 57, *ante*.

³ Compare 1 McLaren, *Law of Wills and Succession*, ss. 63–70.

First. When a will is expressed in the technical terms of the country where it is executed, the presumption is that the testator had reference to the law of the place of execution, and the will, therefore, should be construed with reference to that law.¹ Thus, a testator domiciled in England, but living in France, executes a will there in French, which is expressed in all the technical terms of French law. Such a will ought, it is conceived, to be interpreted with reference to French law.

Secondly. When a will is expressed in the technical terms of the country where it is to be carried into effect, the presumption again is that the testator had reference to the law of the country where the will was to be carried into effect, and the will, therefore, should be construed with reference to that law.

Thus an Englishman domiciled in France executes a will there, leaving his money on English trusts to be executed in England. The will is expressed in the technical terms of English law. There cannot, it is conceived, be a doubt that the will must be interpreted with reference to English law.

(iv) *Effect of Change of Testator's Domicil after Execution of Will.*

RULE 184. — [Subject to the possible exception herein-after mentioned] no will or other testamentary instrument shall be held to have been revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same.²

Comment.

A testator may execute his will when domiciled in France, and may die when domiciled in England. If this is so, the question arises whether the validity of the will depends on the law of France or on the law of England. It is to a case of this kind that Rule 184 applies.

¹ Compare 1 McLaren, *Law of Wills and Succession*, ss. 63-70.

² Wills Act, 1861 (24 & 25 Vict. cap. 114), s. 3.

I have assumed that this section of the Act applies to the wills of aliens no less than of British subjects. This is not certain, as it may be argued, from the title and the other sections of the Act, that the third section, though general in its terms, applies only to the wills of British subjects. The interpretation, however, I have put upon the third section is consistent with its language, and is, I believe, correct.

This Rule, if we omit the words in brackets, reproduces verbatim the Wills Act, 1861 (24 & 25 Vict. cap. 114), s. 3;¹ with this Rule should be read the two Exceptions to Rule 182,² whereof Exception 1³ reproduces the Wills Act, 1861, s. 1, and Exception 2⁴ reproduces the Wills Act, 1861, s. 2. Our Rule, taken together with that part of these Exceptions which refers to a change of domicile, embodies an alteration in the law with respect to the effect on the validity of a will of a change in the testator's domicile after the execution of the will.⁵

Up to 1861 our Courts probably held⁶ (as appears still to be maintained by the Courts of those parts of the United States where the English common law prevails⁷) that a will invalid in point of form by the law of the country where the testator dies domiciled is to be held invalid, even though perfectly valid according to the law of the country where the will was executed. Thus, if a testator, while domiciled in France, made a holograph will in the form allowed by the law of France, but not duly exe-

¹ See App., Note 15, *The Wills Act, 1861*.

² See p. 686, *ante*.

³ See p. 690, *ante*.

⁴ See p. 693, *ante*.

⁵ It is difficult to understand the precise relation in this matter between sections 1 and 2 and section 3 of the Wills Act, 1861. Section 1 and section 2 each provide that a will of a British subject which comes within the terms of the section shall, as regards personal estate, be held to be well executed "whatever may be the domicile of such person at the time of making the same, or at the time of his or her death;" whilst section 1 specifically provides that a will shall be held to be well executed "if the same be made according to the forms required . . . by the law of the place where such person was domiciled when the same was made." When it is remembered that a will of movables, independently of the Act, is valid if made in accordance with the forms required by the law of the place where the testator is domiciled at the time of his death (compare the Wills Act, 1861, s. 4), it seems to follow that a will of movables made by a British subject is prevented, by sections 1 and 2 of the Wills Act, 1861, from being rendered invalid by change in the testator's domicile. But section 3 enacts that no will shall become invalid by reason of any subsequent change of domicile of the person making the same. The result, then, would on the whole appear to be that, as regards the effect to be attributed to a change in the testator's domicile after the execution of his will, section 3 overlaps, so to speak, sections 1 and 2, or, in other words, that the law would be unaltered were the provisions in sections 1 and 2, which have regard to a change of domicile, omitted. On this point the reader should consult App., Note 15, *The Wills Act, 1861*.

⁶ The law before 1861 as to the effect of a change of domicile on the validity of a will was not free from doubt. Compare *Story*, s. 479 g, and *Westlake*, 1st ed., s. 326.

⁷ See *Story*, s. 479 g, citing *Nat v. Coon*, 10 Miss. 543. See *Dupuy v. Wurtz*, 53 N. Y. 556; *Moultrie v. Hunt*, 23 N. Y. 394.

cutted according to the English Wills Act, and afterwards died domiciled in England, his will was before 1861 held invalid here.¹ The enactment (the Wills Act, 1861, s. 3) embodied in Rule 184 was passed to remedy the inconveniences or remove the doubts arising from this state of the law.

As the Wills Act, 1861, 24 & 25 Vict. cap. 114, applies to all wills made by persons who die after 6th August, 1861, and as the third section of the Act applies to the wills both of aliens and of British subjects, a will made by a person capable of making it by the law of his domicil at the time of its execution, and made in the form required by such law, will not now be treated by any English Court² as invalid, either because the testator was under a testamentary incapacity by the law of the country where he died domiciled (in which case the law seems to have been the same before the Act as it is now), or because the will is not made in the form required by the law of such country. It is also clear that all questions of interpretation must be dealt with exactly as they would have been dealt with had the testator not changed his domicil.

Question. — Can a will, which is invalid by the law of the testator's domicil at the time of its execution, be rendered valid by his subsequent change of domicil?

As we are concerned only with the rules of law applied by English Courts, the question raised is, whether our Courts will or will not, under all circumstances, hold a will invalid because it was invalid by the law of the testator's domicil at the time of its execution? This inquiry can arise only on the supposition that the will, though invalid by the law of the testator's domicil at the time of its execution, would (but for the possible effect of that law) be valid by the law of the testator's domicil at the time of his death. We must further suppose that the will is not one which, being executed by a British subject, is made in one of the forms allowed by the Wills Act, 1861, ss. 1 and 2, or, in other words, which comes within either of the Exceptions to Rule 182.

Under these circumstances the answer to the inquiry is in no way affected by the Wills Act, 1861 (24 & 25 Vict. cap. 114), s. 3, and is probably different according as the testator dies domiciled in England or in a foreign country.

¹ In the converse case of an Englishman making his will in England and dying domiciled in France, inconvenience would not arise, since continental Courts maintain the principle *locus regit actum*, or, as applied to the present case, that a will is formally valid if made according to the forms required by the law of the place of execution.

² Or by any Court throughout the British dominions.

First. Where the testator, having made his will in another country, dies domiciled in England, the view our Courts will take of the will depends, it is conceived, on the cause of its invalidity under the law of the testator's domicile at the time of execution.

The *capacity* of a testator to make a will must be determined by the law of his domicile at the time the will is made. "The law "of the actual domicile of the party at the time of the making of "his will or testament was," it has been laid down on high authority, "to govern as to that capacity or incapacity."¹ Hence, if the testator is incapable of making a will by the law of his domicile at the time of its execution, his will must, it would seem, be invalid at the time of his death.

The *form* of a will is perhaps to be determined by the law of the testator's domicile at the time of his death.² If, therefore, the will was invalid only for want of the form required by the law of the testator's domicile at the time of its execution, the will might perhaps, under the circumstances supposed, be held valid.

The *material* or intrinsic validity of a will depends on the law of the testator's domicile at the time of his death.³

If, therefore, the will was invalid or inoperative, according to the law of the testator's domicile, at the time of its execution, on account of its *material invalidity*, i. e., on account of its provisions, but the provisions of the will are not opposed to the law of the testator's domicile at the time of his death, the will is valid.

Secondly. Where the testator, having made his will, then, after a change of domicile, dies domiciled in a foreign country, the effect of a change of domicile in making the will valid will depend wholly on the law of the country where the testator dies. If on any ground the will is good by the law of his last domicile, e. g., France, it will be treated as valid in England.

¹ *Story*, s. 465, approved by *Phillimore*, s. 863. See, however, *contra*, *Westlake*, 3rd ed., p. 105, and compare *Savigny*, s. 377, p. 282.

² *I. e.*, where, as in the case under consideration, 24 & 25 Vict. cap. 114 does not apply.

³ "There is a universal agreement in referring to the law of the domicile at "death, as opposed to that of the domicile when the will was made, all ques- "tions of its intrinsic validity ; as of the proportion of his estate of which the "testator may dispose, legitim, disherison of natural heirs by simple preteri- "tion, and so forth." *Westlake*, 1st ed., s. 328, p. 310. These words are cited from the 1st edition of *Westlake*, *Private International Law*, published in 1859. They do not, as far as I have observed, recur in his later editions ; but see *Westlake*, 3rd ed., p. 105. They express, however, a sound principle.

Illustrations.

1. A testator, when domiciled in France, makes a holograph will of movables valid by the law of France, but not attested by the witnesses required by the English Wills Act. He afterwards becomes domiciled in England and dies there. The will is valid.¹

2. A man domiciled in Scotland makes a will of movables there and then marries. After his marriage he becomes domiciled in England. By the law of England, a marriage revokes a will made before marriage. By the law of Scotland, marriage does not revoke a will made before marriage. The testator dies domiciled in England. His will is valid.²

3. An Englishman is domiciled in a country where minority ends at 25, and minors are under a testamentary incapacity. He makes a will at the age of 22, and after he has attained the age of 25 acquires a domicile and dies in England. His will would (probably) be held invalid in England.

4. An alien when domiciled in a foreign country executes in England a will according to the forms required by the law of England, but not in accordance with the forms required by the law of his domicile. He afterwards becomes domiciled and dies in England. The will is possibly valid.³

5. A Frenchman domiciled in France makes a will bequeathing his movable property in a way prohibited by the law of France, but not prohibited by the law of England. He becomes domiciled and dies in England. The will (semble) is valid.

Exception. — A will which is invalid on account of material invalidity according to the law of the testator's domicile at the time of his death is invalid, although it may have been valid according to the law of the testator's domicile at the time of its execution (?).

Comment.

This Exception is open to some doubt, as it depends upon the interpretation to be put upon 24 & 25 Vict. cap. 114, s. 3. The words of that section are very strong, and may be taken to mean that a will which would have been operative, if the testator had died domiciled in the country where the will was executed, shall

¹ Rule 184, p. 696, *ante*. See The Wills Act, 1861, s. 3.

² *In Goods of Reid*, 1866, L. R. 1 P. & D. 74,

³ See p. 699, *ante*.

not be rendered invalid or inoperative by any subsequent change of domicile; but probably the Act does not refer to material invalidity, and a will which is wholly or in part invalid or inoperative on account of its provisions being opposed to the law of the testator's domicile at the time of death will, since as before the Act, be in so far invalid or inoperative.

Illustration.

T, when domiciled in Ireland, executes a will bequeathing money in the funds on trusts for accumulation in excess of the periods permitted by the Thellusson Act.¹ This statute does not extend to Ireland, and the bequest would be valid should *T* die domiciled in Ireland. *T*, however, after the execution of his will, dies domiciled in England. Whether the will as to this bequest is or is not invalid?

(C) EXECUTION OF POWER BY WILL.

Capacity.

RULE 185.²—A person may have capacity to exercise by will a power of appointment conferred by an English instrument, though he does not possess testamentary capacity under the law of his domicile.

The term "English instrument" in this Rule and in the following Rules means an instrument (*e. g.*, a settlement or a will) which creates a power of appointment and operates under English law.

Comment.

An English instrument, such as an English marriage settlement or will, often gives to some person, *e. g.*, a married woman, power to appoint by will or otherwise, *e. g.*, by deed, the person or persons who shall succeed to movable property at her death. The person to whom the power is given (the donee of the power) derives capacity from the power, and is in effect looked upon as

¹ 39 & 40 Geo. III. cap. 98. Conf. *Freke v. Carbery*, 1873, L. R. 16 Eq. 461.

² See especially, *Westlake*, 3rd ed., p. 107; and see, as to powers executed by married women, *Sugden, Powers*, 8th ed., chap. v., s. 1.

carrying out the wishes of the donor of the power, *e. g.*, the settlor. Even, therefore, when the power is to be exercised by will, the donee's capacity is not in reality testamentary capacity, but simply capacity to execute the power. Hence the existence of this capacity does not depend on the testamentary law of the donee's domicile.

Validity.

RULE 186.¹—A will of movables made in exercise of a power of appointment conferred by an English instrument is entitled to be admitted to probate, and is, as far as form is concerned, a good execution of the power where the will

(1) is executed in accordance with the terms of the power as to execution, *and*

(2) complies with any of the following conditions as to form (that is to say) —

(i) where the will is executed in accordance with the form required by the ordinary testamentary law of England (*i. e.*, if the will be made after the end of 1837),² by the Wills Act, 1837; or

(ii) where the will is executed in accordance with the form required by the law of the testator's (donee's) domicile;³ or

(iii) where the will is executed in accordance with any form which is valid under the Wills Act, 1861,⁴ *i. e.*, where the will is

¹ *Westlake*, 3rd ed., pp. 107, 108; 1 *Williams, Executors*, 9th ed., p. 308; *Foote*, 2nd ed., pp. 259–262; *Tatnall v. Hankey*, 1838, 2 Moore P. C. 342; *Barnes v. Vincent*, 1846, 5 Moore P. C. 201; *In Goods of Alexander*, 1860, 29 L. J. P. & M. 93; *In Goods of Hallyburton*, L. R. 1 P. & D. 90; *D'Huart v. Harkness*, 1865, 34 Beav. 324; 34 L. J. Ch. 311; *In re Kirwan's Trusts*, 1883, 25 Ch. D. 373.

² See the Wills Act, 1837 (7 Will. IV. & 1 Vict. cap. 26), ss. 10, 34; *Tatnall v. Hankey*, 1838, 2 Moore P. C. 342; *In Goods of Alexander*, 1860, 29 L. J. P. & M. 93; *In Goods of Hallyburton*, 1866, L. R. 1 P. & D. 90.

³ *D'Huart v. Harkness*, 1865, 34 Beav. 324; 34 L. J. Ch. 311; and see Rule 181, p. 684, *ante*.

⁴ 24 & 25 Vict. cap. 114, ss. 1, 2, and 3. See, however, 1 *Williams, Executors*, 9th ed., p. 308, note (p), and compare *In re Kirwan's Trusts*, 1883, 25 Ch. D. 373, as to which see Illustration 1, p. 705, *post*.

valid either under Exception 1,¹ or Exception 2,² to Rule 182, or under Rule 184.

Comment.

Under Rule 186 a will is a valid exercise of a power "to appoint by will," or "to appoint by will duly executed," conferred by an English instrument, if, the terms of the power being otherwise followed,³ it complies as to form with any one of the three conditions enumerated in the Rule.⁴ Hence it follows that an instrument may be a valid execution of a power to appoint by will, and therefore in effect a good bequest of movables in England, which, if not executed under a power, would not be treated in England as a valid will.⁵

This is an acknowledged anomaly⁶ which hardly admits of logical defence.⁷

Illustrations.

1. *N*, domiciled in England, by his will bequeaths a certain fund to trustees upon trust to pay the interest to *T*, his daughter, for life, and to any husband of hers who should be living at her death, if she should by will so direct and appoint. *T*, whilst domiciled in England, executes the power in favour of her hus-

¹ See p. 690, *ante*.

² See p. 693, *ante*.

³ As to effect of non-compliance with the terms of the power, see Rule 187, p. 704, *post*, and Exception, p. 706, *post*.

⁴ Rule 186, clause 2.

⁵ See *D'Huart v. Harkness*, 1865, 34 Beav. 324.

⁶ See *Crookenden v. Fuller*, 1859, 29 L. J. P. & M. 1; 1 Sw. & Tr. 441; *In Goods of Alexander*, 1860, 29 L. J. P. & M. 93; *In Goods of Hallyburton*, 1866, L. R. 1 P. & D. 90.

⁷ *Ibid*. For an explanation, though not quite a satisfactory one, see *D'Huart v. Harkness*, 1865, 34 Beav. 324, 327, 328, judgment of *Romilly*, M. R., and note that *D'Huart v. Harkness*, though it has reference to a will made by a testatrix dying before the Wills Act, 1861, 24 & 25 Vict. cap. 114, came into operation, seems to be in principle applicable to a will which is valid under that Act. The existence of the anomaly, which cannot be disputed, may be explained in great part by the consideration that English judges, in determining whether a power to appoint by will is well exercised, have considered mainly whether the intention of the donor has been carried out, and have tended to treat any instrument as a good exercise of the power which the donor might have fairly regarded as a testamentary instrument, without too carefully considering whether it would have been a valid will if executed by the particular donee otherwise than under the power.

band, *H*. *T* at her death, in 1859, is domiciled in Scotland. *H* survives her. The will is executed in accordance with the power, but not in accordance with the testamentary law of Scotland. The will is valid and a good execution of the power.¹

2. Under an English settlement *T* has power to dispose of movables situate in England by will. *T*, domiciled in Scotland, exercises the power by a will made in accordance with the form required by the law of England, but not in accordance with the form required by the law of Scotland. The will is executed in Scotland.² The will is a good execution of the power.³

3. *T*, an Englishwoman by birth, has under the will of her mother power to dispose of £2,000 consols in favour of such persons as she should, by will duly executed, appoint. *T* marries a Frenchman domiciled in France and thereby acquires a French domicil. Whilst domiciled in France she in 1860 exercises her power of appointment in favour of her husband by a will not made in the form required by the English Wills Act, but valid according to the law of France. *T* dies in March, 1861, domiciled in France. The will is a good execution of the power of appointment.⁴

4. *T*, an Englishwoman, has under the will of her mother power to dispose of £2,000 consols in favour of such persons as she should, by will duly executed, appoint. *T* is married to a British subject, and is resident but not domiciled in France. Whilst there resident, she, in 1890, exercises her power of appointment in favour of her husband by a will not made in the form required by the English Wills Act, 1837, but executed in a form which is valid according to the law of France (*lex actus*).⁵ The will (*semble*) is a good execution of the power of appointment.⁶

RULE 187.⁷— Subject to the exception hereinafter mentioned, no will which does not satisfy the requirements of Rule 186⁸ is a valid execution of a power of appointment by will conferred by an English instrument.

¹ *In Goods of Alexander*, 1860, 29 L. J. P. & M. 93.

² So that the Wills Act, 1861, s. 2, has no application, see Exception 2, p. 693, *ante*.

³ *In Goods of Hallyburton*, 1866, L. R. 1 P. & D. 90.

⁴ Compare *D'Huart v. Harkness*, 1865, 34 Beav. 324.

⁵ See Exception 1, p. 690, *ante*, i. e., Wills Act, 1861, s. 1.

⁶ Compare *D'Huart v. Harkness*, 1865, 34 Beav. 324, with *In re Kirwan's Trusts*, 1883, 25 Ch. D. 373, and 1 *Williams, Executors*, 9th ed., 309.

⁷ *Re Daly's Settlement*, 1858, 25 Beav. 456; *In re Kirwan's Trusts*, 1883, 25 Ch. D. 373.

⁸ See p. 702, *ante*.

Comment.

A will is not a valid exercise of a power of appointment which either —

(1) does not follow the terms of the power of appointment as to mode of execution,¹ or

(2) does not as to form comply with some one of the conditions as to form enumerated in Rule 186: in other words, a will, even though it follows the terms of the power, is not a good execution of the power unless as to form it complies with the requirements either of the testamentary law of England, or of the testamentary law of the country where the donee of the power is domiciled, or with the law as to wills of British subjects contained in the Wills Act, 1861.

Illustrations.

1. *T* has a power of appointment by will, to be executed in the presence of one or more witnesses. *T* is a British subject. In 1871 *T*, when in France, intending to exercise the power of appointment, makes a will in his own handwriting, which is signed by him but is unattested, and, in virtue of the power, appoints that his daughter shall succeed to a certain fund. The will is valid according to the law of France (*lex actus*), and complies therefore with one of the forms required by the Wills Act, 1861, s. 1. The will is rightly admitted to probate, *i. e.*, is formally valid, but is not a valid execution of the power.²

2. *T*, an Englishwoman, married to a British subject, has under her marriage settlement a power of appointment in respect of a trust fund. The power is to be exercised by her last will. *T*, when residing in France, but domiciled in England, executes in

¹ See Rule 186, clause 1, p. 702, *ante*.

² *In re Kirwan's Trusts*, 1883, 25 Ch. D. 373. The will, though a valid will as far as form goes, does not follow the terms of the power, and it is not executed in the manner required by the Wills Act, 1837, *i. e.*, it does not come within either Rule 186, clause 1, or within the Exceptions to Rule 187. In other words, it does not fall within Rule 187, and is therefore not a good execution of the power. If, as stated in *Re Kirwan's Trusts* (see 25 Ch. D. 379, judgment of *Kay, J.*), *T* at the time of executing the will was domiciled in France, it would have been formally valid without any reference to the Wills Act, 1861. See *D'Huart v. Harkness*, 1865, 34 Beav. 324, and p. 703, note 7, *ante*. But even so it would not have been a good execution of the power, as neither were the terms of the power followed, nor did the Wills Act, 1837, s. 10, apply. See Exception, p. 706, *post*.

1856 a will which is not in the form required by the Wills Act, 1837, though it is in a form valid by the law of France. *T* dies in 1856.¹ The will is not a valid execution of the power.²

*Exception.*³—A will executed in accordance with the form required by the Wills Act, 1837, is, so far as regards the execution and attestation thereof, a valid execution of a power of appointment by will, notwithstanding that it shall have been expressly required, under the instrument creating the power, that a will made in exercise of such power should be exercised with some additional, or other, form of execution or solemnity.

Illustration.

T has, under an English settlement, a power of appointment by will duly executed and attested by *four* witnesses. *T* exercises the power of appointment by a will in the form required by the Wills Act, 1837, and executed in the presence of, and attested by, *two* witnesses only. The will is a valid execution of the power of appointment by virtue of the Wills Act, 1837, ss. 9 and 10.⁴

¹ Therefore her will does not come within the operation of the Wills Act, 1861.

² *Re Daly's Settlement*, 1858, 25 Beav. 456.

³ "And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." 7 W. 4 & 1 Vict. cap. 26, s. 10.

⁴ See further as to succession, App., Note 16, *Questions where Deceased leaves Property in Different Countries*.

AMERICAN NOTES.

CHAPTER XXX.

SUCCESSION TO MOVABLES.

(A) INTESTATE SUCCESSION.

(Rule 180.) Succession to the movables of an intestate is governed by the law of his domicile at the time of his death. *Wilkins v. Ellett*, 108 U. S. 256, 258; *Harvey v. Richards*, 1 Mason, 381; *King v. Martin*, 67 Ala. 177; *Grote v. Pace*, 71 Ga. 231; *Thomas v. Morrisett*, 76 Ga. 384; *Russell v. Madden*, 95 Ill. 485; *Succession of Gaines*, 45 La. An. 1237; 14 So. 233; *Harral v. Harra*!, 39 N. J. Eq. 279; 51 Am. Rep. 17; *Petersen v. Chemical Bank*, 32 N. Y. 21, 44; *White v. Howard*, 52 Barb. 294; *Cade v. Davis*, 96 N. C. 139; *Desesbats v. Berquier*, 1 Binney, 336; *Hill v. Townsend*, 24 Tex. 575; *Wharton, Conf. of L. s. 576*; 1 *Redfield on Wills*, 4th ed. **393-396. The amount which the widow of an intestate may recover for her year's support is governed by the law of his domicile at the time of his death. *Mitchell v. Ward*, 64 Ga. 208. See, however, *Wharton, Conf. of L. s. 571*.

(B) TESTAMENTARY SUCCESSION.

1. (Rule 181.) VALIDITY OF WILL. — A will of movables valid according to the law of the testator's last domicile is valid. *Lewis' Estate*, 32 La. An. 385; *Succession of Gaines*, 45 La. An. 1237; 14 So. 233; *Despard v. Churchill*, 53 N. Y. 192; *Von Hoffman v. Ward*, 4 Redf. (N. Y.) 244; *Tucker v. Field*, 5 Redf. (N. Y.) 139; *Talbot v. Chamberlain*, 149 Mass. 57; 20 N. E. 305; *Hurat v. Mellinger*, 73 Tex. 188; 11 S. W. 184. The citizenship of the testator is immaterial. *Dammert v. Osborn*, 141 N. Y. 564.

In *Chamberlain v. Chamberlain*, 43 N. Y. 424, it was said that, while the law of the testator's domicile controlled as to the formal requisites of a will, and as to the testator's capacity, the law of the domicile of the legatee would govern the latter's capacity, and from this premise the conclusion was reached that a bequest to a charitable corporation in Pennsylvania was invalid because under the statutes of Pennsylvania the legatee was incapable of taking. This ruling was cited in *Kerr v. Dougherty*, 79 N. Y. 327, in which it was held that a bequest to a Pennsylvania charitable institution was invalid because a Pennsylvania statute provided that no charitable bequest should be valid unless made at least a month before the testator's death. Wharton observes that this ruling is "open to grave objections." *Conf. of L. s. 577*. In *Mapes v. American Home Missionary Society*, 33 Hun, 360, the Court, citing *Chamberlain v. Chamberlain*, *supra*, held that a bequest by a testator domiciled in Connecticut to an unincorporated association in New York was invalid under the law of the latter State, though valid under the laws of Connecticut.

But in *Cross v. U. S. T. Co.* 131 N. Y. 330, the Court of Appeals held that a testamentary disposition of personal property in trust, by a person domiciled

in Rhode Island, for the benefit of residents of New York was valid because valid under the laws of the former State, though it contravened the New York statute relating to perpetuities. The Court said: "It is plain that the question now before us was not involved in these cases [*i. e.*, *Chamberlain v. Chamberlain*, *supra*, and another case] and was not decided. The cases of "*Draper v. Harvard College* (57 How. Pr. 269), *Kennedy v. Town of Palmer* (1 T. & C. 581), and *Mapes v. American Home Missionary Society* (33 Hun, 360), in so far as they decide any principle applicable to this question, rest "upon the authority of *Chamberlain v. Chamberlain*."

In *Dammert v. Osborn*, 140 N. Y. 30; 35 N. E. 407, a testator domiciled in Peru bequeathed property in trust to found a charity in the city of New York. The validity of the bequest was attacked on the ground that it violated the New York statute relating to perpetuities, as well as on the ground that there was not at the time of the testator's death a trustee capable of taking. The bequest, being valid under the law of the testator's domicile at the time of his death, was upheld. See also, *Dammert v. Osborn*, 141 N. Y. 564; 35 N. E. 1088; *Merritt v. Corties*, 71 Hun, 612; 24 Y. Y. Supp. 561.

Statutory limitations of the right of bequest to charitable institutions are not applicable to testators domiciled in another State. *Crum v. Bliss*, 47 Conn. 592; *Healey v. Reed*, 153 Mass. 197; 26 N. E. 404. Nor is a testamentary trust, valid by the law of the testator's last domicile, in favor of a foreign legatee, invalid because at the time of the testator's death such legatee was incapable of taking. *Fellows v. Miner*, 119 Mass. 541; *Sohier v. Burr*, 127 Mass. 221.

2. (Rule 182.) INVALIDITY OF WILL. — A will invalid under the law of the testator's last domicile is invalid. *Thomason's Estate*, 13 Phila. 376. By the statutes of New York, however, a will not executed in accordance with the law of the testator's domicile may be admitted to probate, as a valid will of personalty, if its execution meets the requirements of the New York law. *Matter of McMulkin*, 5 Dem. 295; *Matter of Delaplaine*, 5 Dem. 398. As to the statutes in Massachusetts and other States, see 1 *Jarman on Wills*, 6th ed., Am. notes by Bigelow, pp. 2, 3; *Stimson's American Statute Law*, s. 2656.

The tendency of the New York cases has been to maintain that the laws relating to trusts and perpetuities apply, as to personalty, only to domestic wills which are to be enforced in the State; and it has been held that a bequest made by a competent New York testator, in a will executed in accordance with the laws of the State, to a trustee in a foreign country, for the purpose of establishing a charity in such country, is valid though it does not comply with the statutes or the rules of law in force in New York in regard to trusts and perpetuities. *Hope v. Brewer*, 136 N. Y. 126; 32 N. E. 558. See *Dammert v. Osborn*, 140 N. Y. 30; *Matter of Bullock*, 6 Dem. 335; *Doty v. Hendrix*, 16 N. Y. Supp. 284. See *Ford v. Ford*, 80 Mich. 42.

The question whether a person dies intestate as to his movables is determined by the law of his last domicile. *Dupuy v. Wurtz*, 53 N. Y. 556.

3. (Rule 183.) INTERPRETATION OF WILL. — *Wharton, Conf. of L.* s. 592, says that the interpretation of a will of movables is determined by the law of the testator's last domicile. The American cases cited by him do not, however, fully bear out the proposition. In *Parsons v. Lyman*, 20 N. Y. 103, and in *Freeman's Appeal*, 68 Pa. St. 151, the testator does not appear to have changed

his domicile after making his will. In *Harrison v. Nixon*, 9 Peters, 483, which is cited as the leading case, the Court said : " If, at the time of making his will and at his death, he [the testator] was domiciled in England, and had " a reference to its laws, the designation [' heir at law '] might indicate a very " different person or persons from what might be the case (we do not say " what is the case) if, at the time of making his will and of his death, he was " domiciled in Pennsylvania. . . . In order to avoid any misconception, it is " proper to state that we do not mean . . . to express any opinion what would " be the effect upon the interpretation of the will, if the domicile of the testator " was in one country at the time of his making his will and in another country " at the time of his death." *Adams v. Morris*, 23 How. 353, related to a codicil disposing of land. The codicil was made in California, where the land lay, by a naturalised Mexican citizen there domiciled, when California was a department of Mexico ; but the testator died in 1848, without having changed his domicile, after California had been detached from Mexico, but before the organisation of the state government. The Court said : " The binding force " and legal operation of this codicil are to be determined by the law as it existed when the codicil was made." On the other hand, in *Norris v. Harris*, 15 Cal. 226, which is cited as holding that a will should be interpreted according to the law of the place where it was made, if the property is there situate, the will was made in Texas, where the testator was and continued to be domiciled, and it was held that the will should be construed according to the laws of Texas. In *Nat v. Coons*, 10 Mo. 543, the point decided was that a will was invalid because it was not executed in accordance with the law of the testator's last domicile.

Schouler, Law of Wills, s. 491, says that the law of the testator's last domicile governs interpretation, but that the law of the place where the will was made " is allowed some effect." He does not cite any American decisions.

Cases are not rare in which it is said that the law of the testator's (last) domicile governs the interpretation of a will of personalty, the fact being that the will was made there, *e. g.*, *Fitzsimmons v. Johnson*, 90 Tenn. 416 ; 17 S. W. 100 ; *Freeman's Appeal*, *supra*. In *Caulfield v. Sullivan*, 85 N. Y. 153, where a will was written and executed in France in the French language, by a person domiciled in New York but temporarily residing in France, it was said that the will must be " construed " according to the laws of New York. But the question to which the New York " rules of construction " were applied was not a question of interpretation. The testator devised and bequeathed to a person who resided with him in France, and who had a claim against him, all his property in that country ; and from the provisions of the will it was clearly inferable that this legacy, if accepted, was intended by the testator to operate as a satisfaction of any claim of the legatee against the estate. It was held that the legatee, having elected to accept the bequest, was bound by such election, and could not thereafter proceed on the claim against the testator's property in America, which had been devised and bequeathed to other persons.

" The language of wills is not of universal interpretation, having the same " precise import in all countries and under all circumstances. They are supposed to speak the sense of the testator, according to the received laws or " usages of the country where he is domiciled, by a sort of tacit reference, " unless there is something in the language which repels or controls such a conclusion. In regard to personalty in an especial manner, the law of the place " of the testator's domicile governs in the distribution thereof, and will govern

"in the interpretation of wills thereof, unless it is manifest that the testator had the laws of some other country in his own view." *Story, J.*, delivering the opinion of the Court in *Harrison v. Nixon*, 9 Peters, 483, 504, 505. Interpretation is primarily a question of the testator's intention; and in the absence of an absolute rule to which the Court may in exceptional cases be required to yield, that law will be applied with reference to which it is, under all the circumstances, to be inferred that the testator expressed his will. See *Guerard v. Guerard*, 73 Ga. 506; *Ford v. Ford*, 70 Wis. 19; 1 *Jarman on Wills*, 6th ed., Bigelow's notes, pp. 1-3.

The "meaning and intent of the testator having been settled by the domiciliary Court, the Courts in foreign states and countries will be guided by such construction, unless it can be clearly gathered, from the terms used in the will, that the testator had in mind the law of the place of the *situs*, or used language necessarily referring to the usages of and appropriate only to the *situs*." *Ford v. Ford*, 80 Mich. 42.

4. (Rule 184.) CHANGE OF DOMICIL AFTER EXECUTION OF WILL.—The text cites, under this rule, *Dupuy v. Wurtz*, 53 N. Y. 556; *Moultrie v. Hunt*, 23 N. Y. 394; and *Nat v. Coons*, 10 Mo. 543, which decide, according to the common law, that the validity of the execution of a will is to be tested by the law of the testator's domicile at the time of his death. This rule was laid down in *Moultrie v. Hunt*, *supra*, after much discussion, by a bare majority, against the dissent of three eminent judges. *Dupuy v. Wurtz*, *supra*. The rule has been changed in some of the States by statute, so that the law of the domicile at the time of the making of the will governs the execution. *Stimson's American Statute Law*, s. 2653.

(C) EXECUTION OF POWER BY WILL.

(Rules 185-187.) Though the validity, in point of form, of a will by which a power of appointment as to movables is sought to be exercised is governed by the law of the testator's domicile, yet the question whether such a power given by a will has been well executed is governed by the law of the domicile of the donor of the power. *Sewall v. Wilmer*, 132 Mass. 131; *Bingham's Appeal*, 64 Pa. St. 345; *Cotting v. De Sartiges*, 17 R. I. 668; 24 Atl. 530. See *Wharton, Conf. of L.* s. 590.

CHAPTER XXXI.

PROCEDURE,¹

RULE 188.¹—All matters of procedure are governed wholly by the local or territorial law of the country to which a Court wherein an action is brought or other legal proceeding is taken belongs (*lex fori*).

In this Digest, the term “procedure” is to be taken in its widest sense, and includes (*inter alia*)—

- (1) remedies and process ;
- (2) evidence ;
- (3) limitation of an action or other proceeding ;
- (4) set-off or counter-claim.

Comment.

The principle that procedure is governed by the *lex fori* is of general application and universally admitted, but the Courts of any country can apply it only to proceedings which take place in, or at any rate under the law of, that country. In a body of Rules, therefore, such as those contained in this Digest, which state the principles enforced by an English Court, the maxim that procedure is governed by the *lex fori* means in effect that it is governed by the ordinary law of England, without any reference to any foreign law whatever. The maxim is in fact a negative rule ; it lays down that the High Court, in common, it may be added, with every other English Court, pursues its ordinary practice and adheres to its ordinary methods of investigation whatever be the character of the parties, or the nature of the cause which is brought before it.

“A person,” it has been said, “suing in this country, must take the law as he finds it ; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior

¹ *Story*, 7th ed., ss. 556–583. See also, chap. xvii. ; *Westlake*, 3rd ed., chap. xviii. ; *Foote*, 2nd ed., chap. x. ; *Nelson*, p. 424.

"advantage which the law of this country may confer. He is to "have the same rights which all the subjects of this kingdom are "entitled to,"¹ and the foreign defendant, it may be added, is to have the advantages, if any, which the form of procedure in this country gives to every defendant.

Whilst, however, it is certain that all matters which concern procedure are in an English Court governed by the law of England, it is equally clear that everything which goes to the substance of a party's rights and does not concern procedure is governed by the law appropriate to the case.

"The law on this point is well settled in this country, where "this distinction is properly taken, that whatever relates to the "remedy to be enforced must be determined by the *lex fori*, — the "law of the country to the tribunals of which the appeal is "made,"² — but that whatever relates to the rights of the parties must be determined by the proper law of the contract or other transaction on which their rights depend.

Our Rule is clear and well established. The difficulty of its application to a given case lies in discriminating between matters which belong to *procedure* and matters which affect the *substantive rights* of the parties. In the determination of this question two considerations must be borne in mind : —

First. English lawyers give the widest possible extension to the meaning of the term "procedure." The expression, as interpreted by our judges, includes all legal remedies, and everything connected with the enforcement of a right. It covers, therefore, the whole field of practice ; it includes the whole law of evidence, as well as every rule in respect of the limitation³ of an action or of any other legal proceeding for the enforcement of a right, and hence it further includes the methods, *e. g.*, seizure of goods or arrest of person, by which a judgment may be enforced.

Secondly. Any rule of law which solely affects, not the *enforcement* of a right but the *nature* of the right itself, does not come under the head of procedure. Thus, if the law which governs, *e. g.*, the making of a contract, renders the contract absolutely void, this is not a matter of procedure, for it affects the rights of the parties to the contract, and not the remedy for the enforcement of such rights.

¹ *De la Vega v. Vianna*, 1830, 1 B. & Ad. 284, 288, judgment of *Tenterden*, L. J.

² *Don v. Lippmann*, 1837, 5 Cl. & F. 1, 13, per Lord Brougham.

³ See contra, *Savigny*, s. 374, *Guthrie's transl.*, pp. 249, 267–272 ; *Bar, Gillespie's transl.*, pp. 624–627.

Hence any rule limiting the time within which an action may be brought, any *limitation* in the strict sense of that word, is a matter of procedure governed wholly by the *lex fori*. But a rule which after the lapse of a certain time extinguishes a right of action — a rule of *prescription* in the strict sense of that word — is not a matter of procedure, but a matter which touches a person's substantive rights, and is therefore governed, not by the *lex fori*, but by the law, whatever it may be, which governs the right in question. Thus if, in an action for a debt incurred in France, the defence is raised that the action is barred under French law by lapse of time, or that for want of some formality an action could not be brought for the debt in a French Court, the validity of the defence depends upon the real nature of the French law relied upon. If that law merely takes away the plaintiff's *remedy*, it has no effect in England. If, on the other hand, the French law extinguishes the plaintiff's *right* to be paid the debt, it affords a complete defence to an action in England.¹

To this it must be added that an English statutory enactment, which affects both a person's rights and the method of its enforcement, establishes a rule of procedure and therefore applies to an action in respect of a right acquired under foreign law. Hence the 4th section of the Statute of Frauds,² and the 4th section of the Sale of Goods Act, 1893, which, whether affecting rights or not, certainly affect procedure,³ apply to actions on contracts made in a foreign country and governed by foreign law. Whence the conclusion follows that a contract though made abroad, which does not satisfy the provisions of the 4th section of the Statute of Frauds, or of the Sale of Goods Act, 1893, respectively, cannot be enforced in England.

With regard to the Illustrations to this Rule it must always be borne in mind that, as we are dealing with proceedings before an English Court, the *lex fori* is the same thing as the law of England.

Illustrations.

(1) Remedies and Process.

1. *A* brings an action against *X* to obtain specific performance of a contract made between *A* and *X* in and subject to the law of a foreign country. The contract is one of which *A* might, according to the law of that country (*lex loci contractus*), obtain specific

¹ See Intro., General Principle No. I., p. 22, *ante*.

² *Leroux v. Brown*, 12 C. B. 801.

³ *Jones v. Victoria Graving Co.* 1877, 2 Q. B. D. 314, 323, language of *Lush, J.*

performance, but it is not one for which specific performance can be granted according to the law of England (*lex fori*). *A* cannot maintain an action for specific performance.

2. *A* brings an action against *X* for breach of a contract made with *X* in Scotland as a member of a Scotch firm. According to the law of Scotland (*lex loci contractus*), *A* could not maintain an action against *X* until he had sued the firm, which he has not done. According to the law of England (*lex fori*), the right to bring an action against the member of a firm does not depend upon the firm having been first sued. *A* can maintain an action against *X*.¹

3. *A*, a Portuguese, at a time when arrest of a debtor on mesne process is allowable under the law of England (*lex fori*), but is not allowable under the law of Portugal (*lex loci contractus*), brings an action against *X*, a Portuguese, for a debt contracted in Portugal. *A* has a right to arrest *X*.²

4. *A* in Spain sells *X* goods of the value of £50. The contract is made by word of mouth, and there is no memorandum of it in writing. The contract is valid and enforceable according to Spanish law (*lex loci contractus*). A contract of this description is, under the Sale of Goods Act, 1893, s. 4 (*lex fori*), not enforceable by action. *A* cannot maintain an action against *X* for refusal to accept the goods.³

(2) Evidence.

5. *A* brings an action against *X* to recover a debt incurred by *X* in and under the law of a foreign country (*lex loci contractus*). *A* tenders evidence of the debt which is admissible by the law of

¹ *Bullock v. Caird*, 1875, L. R. 10 Q. B. 276.

² *De la Vega v. Vianna*, 1830, 1 B. & Ad. 284, with which contrast *Melan v. Fitzjames*, 1797, 1 B. & P. 138.

³ See *Acebal v. Levy*, 1834, 10 Bing. 376, and note that the Sale of Goods Act, 1893, s. 4, differs in wording from the Statute of Frauds, s. 17. The Sale of Goods Act, 1893, s. 4, enacts that no contract which comes within it "shall be enforceable by action." The Statute of Frauds, s. 17, enacted that no contract which comes within it "shall be allowed to be good," but even this enactment probably referred to procedure. Contrast, however, *Story*, ss. 262, 262 a.

It is a curious question how far the Infants' Relief Act, 1874, 37 & 38 Vict. cap. 62, applies to procedure. If the words of the Act are to be strictly construed, it would seem that the 1st section does not, whilst the 2nd section does, touch procedure. Probably, however, each section is intended to establish a rule of procedure, and therefore affects the enforceability of any contract, wherever made or by whatever law it is governed, coming within the section.

the foreign country, but is inadmissible by the law of England (*lex fori*). The evidence is inadmissible.¹

6. *A* brings an action against *X*, an Englishman, for breach of a promise of marriage made by *X* to *A*, a German woman, at Constantinople. *A* has not such corroborative evidence as is required by 32 & 33 Vict. cap. 68, s. 2 (*lex fori*). *A* cannot prove the promise or maintain the action.²

7. *A*, a Frenchman, makes a contract in France with *X*, an Englishman, to serve him in France from a future date for a year certain. The contract is made by word of mouth, and there is no memorandum of it in writing. It is a contract valid by the law of France (*lex loci contractus*), for the breach of which an action might be brought in a French Court, but under the 4th section of the Statute of Frauds no action can be brought on such an agreement unless there is a memorandum thereof in writing. The enactment applies to procedure. *A* cannot maintain an action in England against *X* for breach of the contract.³

(3) Limitation.

8. *X* contracts a debt to *A* in Scotland. The recovery of the debt is not barred by lapse of time, according to Scotch law (*lex loci contractus*), but it is barred by the English Limitation Act, 1623, 21 Jac. I. cap. 16 (*lex fori*). *A* cannot maintain an action against *X*.⁴

9. *X* incurs a debt to *A* in France. The recovery of such a debt is barred by the French law of limitation (*lex loci contractus*), but is not barred by any English Statute of Limitation. *A* can maintain an action for the debt against *X*.⁵

10. *A* in a Manx Court brings an action against *X* for a debt incurred by *X* to *A* in the Isle of Man. The action, not being brought within three years from the time when the cause of action arose, is barred by Manx law, and judgment is on that account given in favour of *X*. *A* then, within six years from the time when the debt is incurred, brings an action against *X* in England.

¹ *Brown v. Thornton*, 1837, 6 A. & E. 185. Compare *Finlay v. Finlay*, 1862, 31 L. J. P. & M. 149.

² *Wiedemann v. Walpole*, [1891] 2 Q. B. (C. A.) 534.

³ *Conf. Leroux v. Brown*, 1852, 12 C. B. 801, 22 L. J. C. P. 1.

⁴ *British Linen Co. v. Drummond*, 1830, 10 B. & C. 903.

⁵ *Huber v. Steiner*, 1835, 2 Scott, 304. Compare *Don v. Lippmann*, 1837, 5 Cl. & F. 1; *Fergusson v. Fyffe*, 1841, 8 Cl. & F. 121; *Ruckmaboye v. Mottichund*, 1852, 8 Moore P. C. 4.

This action is not barred by the English Limitation Act, 1623 (*lex fori*). *A* can maintain his action against *X*.¹

11. *X*, under a bond made in India, is bound to repay *A* £100. Specialty debts have, under the law of India (*lex loci contractus*), no higher legal value than simple contract debts, and under that law the remedy for both is barred by the lapse of three years. The period of limitation for actions on specialty debts is, under the law of England, — 3 & 4 Will. IV. cap. 42, s. 3 (*lex fori*), — twenty years. *A*, ten years after the execution of the bond, brings an action in England upon it against *X*. *A* can maintain the action.²

(4) *Set-off*.

12. *X* in 1855 contracts in Prussia with *A* for the carriage by *A* of goods by sea from Memel to London. *A* brings an action against *X* for the freight, and *X* under Prussian law (*lex loci contractus*) claims to set off money, due to him by way of damages from *A*, which could not at that date be made, according to the rules of English procedure (*lex fori*), the subject either of a set-off or a counter-claim. *X* is not allowed to set off, against the money due to *A*, the damages due from *A* to *X*.³

Lex Fori not Applicable.

13. *A* brings an action on a contract made by word of mouth between *X* and *A* in and under the law of a foreign country. It is a kind of contract which under the law of England (*lex fori*) is valid though not made in writing, but under the law of the foreign country (*lex loci contractus*) is void if not made in writing. *A* cannot maintain his action, i. e., the validity of the contract is governed in England, not by the *lex fori*, but by the *lex loci contractus*.⁴

14. *A* brings an action against *X* for breach of a contract made in a foreign country. It is proved that under the law of that country (*lex loci contractus*) the contract for want of a

¹ *Harris v. Quine*, 1869, L. R. 4 Q. B. 653. See as to the judgment, p. 422, ante.

² *Alliance Bank of Simla v. Carey*, 1880, 5 C. P. D. 429. Whether this case is rightly decided?

³ *Meyer v. Dresser*, 1864, 16 C. B. N. s. 646; 33 L. J. C. P. 289. Contrast *MacFarlane v. Norris*, 1862, 2 B. & S. 783. Since the Judicature Acts came into force, the value of the goods not carried could (seem) be claimed under a counter-claim. Conf. also, *Allen v. Kemble*, 1848, 6 Moore P. C. 314 (as explained in *Rouquette v. Overmann*, 1875, L. R. 10 Q. B. 525, 540, 541); *Maspons v. Mildred*, 1882, 9 Q. B. D. (C. A.) 530; 1883, 8 App. Cas. 874.

⁴ Compare *Bristow v. Sequeville*, 1850, 5 Ex. 275; 19 L. J. Ex. 289.

stamp is unenforceable. If the want of the stamp merely deprives *A* of his remedy in the foreign country, then he can maintain an action in England for breach of the contract, *i. e.*, the want of the stamp merely affects procedure which is governed by the *lex fori*. If the want of the stamp makes the contract void *ab initio*, then *A* cannot maintain an action in England, *i. e.*, the want of a stamp affects a matter of right and is governed by the *lex loci contractus*.¹

15. *X* commits an assault upon *A* in Jamaica. For some time after the assault is committed, *A* might, had *X* been in England, have maintained an action for it there against *X*. Before *X* returns to England the legislature of Jamaica passes an Act whereby *X* is in respect of the assault acquitted and indemnified against the Queen and all other persons, and the assault is declared to be lawful. *X* then returns to England, and *A* brings an action against *X* for the assault. *A* cannot maintain the action, *i. e.*, the character of the act done by *X*, or *A*'s right to treat it as a wrong, is governed, not by the *lex fori*, but by the *lex loci delicti commissi*.²

¹ Compare *Bristow v. Sequeville*, 1850, 5 Ex. 275; 19 L. J. Ex. 289.

² See *Phillips v. Eyre*, 1870, L. R. 6 Q. B. 1 (Ex. Ch.).

Whether action would have been maintainable if *X* had returned to England and *A* had commenced the action, but not brought the case to trial, before the passing of the Jamaica Act of Indemnity? Compare p. 666, *ante*.

AMERICAN NOTES.

CHAPTER XXXI.

PROCEDURE.

(Rule 188.) PROCEDURE GOVERNED BY *lex fori*. — Matters of procedure are governed by the *lex fori*. *Lamar v. Micou*, 112 U. S. 452; *Wadsworth v. Henderson*, 16 Fed. Rep. 447; *Gross v. Jordan*, 83 Mo. 380; 22 Atl. 250; *Fanton v. Middlebrook*, 50 Conn. 44; *Lewis v. Bush*, 30 Minn. 244; *Ruhe v. Buck* (Mo.), 27 S. W. 412; *Bullock v. Bullock* (N. J.), 27 Atl. 435; *N. Y. Life Ins. Co. v. Aikin*, 125 N. Y. 660; 26 N. E. 732. Hence the *lex fori* determines the forms of suit and of process, *Wharton, Conf. of L.*, 2nd ed., ss. 747-750; *Cronan v. Fox*, 50 N. J. L. 417; *Glenn v. Busey*, 5 Mackey, 233; matters of pleading, including the question of set-off or counter-claim, and that of alleging want of consideration, *Wharton, Conf. of L.* ss. 788, 789; *Bank of Ogden v. Davidson*, 18 Oregon, 57; the execution of judgments, *Wharton, Conf. of L.* ss. 790, 791; *Denny v. Faulkner*, 22 Kan. 89; *Elizabethtown Inst. v. Guber*, 34 N. J. Eq. 130; questions of costs, *Security Co. v. Eyer*, 36 Neb. 507; 54 N. W. 838; and the kind and amount of evidence necessary to prove a cause of action, *Pritchard v. Norton*, 106 U. S. 124; *Hoadley v. Northern Transportation Co.* 115 Mass. 304; *Helton v. Railway Co.* 97 Ala. 275; 12 So. 276; *Richmond & D. R. Co. v. Mitchell* (Ga.), 18 S. E. 290; *Genet v. D. & H. C. Co.* 56 N. Y. Super. Ct. 27; 4 N. Y. Supp. 880. As to the proof of foreign documents and official acts, see *Wharton, Conf. of L.*, 2nd ed., ss. 755-768; *Frederick v. Davis*, 3 Mont. 251.

The limitation of actions, as a question affecting the remedy, is determinable by the *lex fori*. *Munos v. Southern Pac. Co.* 51 Fed. Rep. 188; 2 C. C. A. 163; 2 U. S. App. 222; *Burgett v. Williford*, 56 Ark. 187; 19 S. W. 750; *O'Shields v. Railway Co.* 83 Ga. 621; 10 S. E. 268; *Krogg v. Atlantic & W. P. R. R. Co.* 77 Ga. 202; *Rice v. Moore* (Kan.), 30 Pac. 10; *Labatt v. Smith*, 83 Ky. 599; *Farmers' & Traders' Nat. Bank v. Lovell* (Ky.), 1 S. W. 426; *Thompson v. Reed*, 75 Me. 404; *Stirling v. Winter*, 80 Mo. 141; *Williams v. St. L. & S. F. Ry. Co.* (Mo.) 27 S. W. 387; *Hurley v. Missouri Pac. Ry. Co.* 57 Mo. App. 675; *Morgan v. Met. St. Ry. Co.* 51 Mo. App. 523; *Atrill v. Huntington*, 70 Md. 191; *Willard v. Wood*, 4 Mackey, 538; *Beer v. Simpson*, 65 Hun, 17; 22 Civ. Proc. 351; *Burrows v. French*, 34 S. C. 165; *Sawyer v. Macaulay*, 18 S. C. 543; *Carrigan v. Semple*, 72 Tex. 306. This rule applies to suits on foreign judgments where the Statute of Limitations is pleaded. *Fanton v. Middlebrook*, 50 Conn. 44; *Bauserman v. Charlott*, 46 Kan. 480; *Ambler v. Whipple* (Ill.), 28 N. E. 841; *Packer v. Thompson*, 25 Neb. 688; 41 N. W. 650.

But if the statute in force in the jurisdiction in which the cause of action arose extinguishes the debt or obligation, and does not merely bar the remedy, it governs, and if it has taken effect no action can be maintained in another jurisdiction. *Walsh v. Mayer*, 111 U. S. 31; *Canadian Pacific Ry. Co. v.*

Johnson, 9 C. C. A. 587 ; 61 Fed. Rep. 738 ; *Theoruz v. Northern Pac. R. Co.* 64 Fed. Rep. 84 ; 12 C. C. A. 52 ; *Sea Grove &c. Asso. v. Stockton*, 148 Pa. St. 145 ; 23 Atl. 1063 ; *Allen v. Allen*, 95 Cal. 184 ; 30 Pac. 213 ; *Rathbone v. Coe*, 6 Dak. 91 ; 50 N. W. 620 ; *Williams v. Railway Co.* 123 Mo. 573 ; *Lyman v. Campbell*, 34 Mo. App. 213. And by legislative enactments in a number of States the Statute of Limitations in force in the jurisdiction in which the cause of action arose is adopted, to a greater or less extent, for the purpose of determining whether the remedy is barred. *Minnice v. Jeter*, 65 Ala. 222 ; *Wooley v. Yarnell*, 142 Ill. 442 ; *Bemis v. Stanley*, 93 Ill. 230 ; *Wernse v. Hall*, 101 Ill. 423 ; *Osgood v. Artt*, 11 Biss. C. C. 160 ; *Morrison v. Kendall* (Ind. App.), 33 N. E. 370 ; *Labatt v. Smith*, 83 Ky. 599 ; *Northwestern Mut. Life Ins. Co.* (Ky.) 20 S. W. 607 ; *Crooker v. Pearson*, 41 Kan. 410 ; 21 Pac. 270 ; *McCann v. Randall*, 147 Mass. 81 ; *Frye v. Parker*, 84 Me. 251 ; 24 Atl. 844 ; *Webster v. Davies* (Neb.), 51 N. W. 484 ; *Luce v. Clarke*, 49 Minn. 356 ; 51 N. W. 1162 ; *Chevrier v. Robert*, 6 Mont. 319 ; *Graves v. Coutant*, 31 N. J. Eq. 763 ; *McCain v. Gibson*, 7 Wash. 314 ; 35 Pac. 64. A foreign corporation, when sued in New York, cannot plead the New York Statute of Limitations. *Robeson v. Central R. R. of N. J.* 76 Hun, 444 ; 28 N. Y. Supp. 104.

"The law of Great Britain since the Declaration of Independence is the law "of a foreign country, and, like any other foreign law, is matter of fact, which "the Courts of this country cannot be presumed to be acquainted with, or to "have judicial knowledge of, unless it is pleaded and proved." *Liverpool Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 445.

The rule that Courts are not bound to take judicial notice of foreign laws prevails in the United States not only in respect of the laws of foreign countries, but in respect of the laws of the several States of the Union, which are considered as in this respect foreign to each other. *Hanley v. Donoghue*, 116 U. S. 1, 4 ; *Sammis v. Wightman*, 31 Fla. 10 ; *Sloan v. Torry*, 78 Mo. 623. If, therefore, the law of another State is relied on, it must be proved as a fact, *Huntington v. Attrill*, 146 U. S. 657 ; *Kelley v. Kelley*, 161 Mass. 111 ; *Ufford v. Spaulding*, 156 Mass. 65 ; *Hackett v. Potter*, 135 Mass. 349 ; *In re Capper's Will*, 85 Iowa, 82 ; 52 N. W. 6 ; *Roll v. St. Louis & Colorado S. & M. Co.* 52 Mo. App. 60 ; though, if the evidence consists of a statute or judicial decision, its construction is for the Court. *Ufford v. Spaulding*, 156 Mass. 65 ; *Thomson-Houston Electric Co. v. Palmer* (Minn.), 53 N. W. 1137 ; *Alexander v. Pennsylvania Co.* 48 Ohio St. 623 ; 30 N. E. 69. See *State v. Hinchman*, 27 Pa. St. 479 ; *Hall v. Costello*, 48 N. H. 179 ; *Monroe v. Douglass*, 5 N. Y. 444. But it has been suggested that where, by the local law of a State (e. g., *Hobbs v. Memphis & Charleston R. R.* 7 Heisk. (Tenn.) 873), its highest Court takes judicial notice of the laws of other States, the Supreme Court of the United States on writ of error might take judicial notice of them. *Hanley v. Donoghue*, 116 U. S. 1, 7. A non-resident is not presumed to know the laws, public acts, or records of a State. *Sedman v. Davis*, 93 N. Y. 32.

In the absence of proof of the foreign law, it will be presumed to be the same as that of the forum. *Laird v. State*, 61 Md. 309 ; *Scroggin v. McClelland*, 37 Neb. 644 ; 56 N. W. 208 ; *Haggin v. Haggin*, 35 Neb. 375 ; 53 N. W. 209 ; *Missouri Pac. Ry. Co. v. Sharritt*, 43 Kan. 375 ; 23 Pac. 430 ; *Sandridge v. Hunt*, 40 La. Ann. 766 ; *Cannon v. Northwestern Mut. Life Ins. Co.* 29 Hun, 470 ; *Chapin v. Dobson*, 78 N. Y. 74 ; *Palmer v. Atchison, T. & S. F. Co.* (Cal.) 35 Pac. 630 ; *Bierhaus v. W. U. Tel. Co.* (Ind. App.) 34 N. E. 581 ; *Thurmond v. Bank* (Tex. Civ. App.), 27 S. W. 317 ; *Stevenson v. Pullman's Palace Car Co.*

26 S. W. 112; *American Co. v. Standard Co.* (Utah) 33 Pac. 246; *Mewer v. C., M. & St. P. Ry. Co.* (S. D.) 59 N. W. 945. See *Marsters v. Lash*, 61 Cal. 622. This rule applies to the rate of interest. *Fitzgerald v. F. & M. Const. Co.* (Neb.) 59 N. W. 838. See *Wharton, Conf. of L.* s. 780.

In matters of common-law cognisance, the common law will, in the absence of proof to the contrary, be presumed to prevail in another State. *Bradley v. Harden*, 73 Ala. 70; *Com. v. Graham*, 157 Mass. 73; *Carpenter v. Grand Trunk Ry. Co.* 72 Me. 388; 39 Am. Rep. 340; *Buchanan v. Hubbard*, 119 Ind. 187; 21 N. E. 538; *Seyfert v. Edison*, 45 N. J. L. 393; *Benbow v. Moore* (N. C.), 19 S. E. 156; *Eureka Springs Ry. v. Timmons*, 51 Ark. 459; 11 S. W. 690; *Knapp v. Knapp* (Mich.), 55 N. W. 353; *Mohr v. Miesen*, 47 Minn. 228; 49 N. W. 862; *Jones v. Rice* (Ga.), 18 S. E. 348; *In re Hamilton*, 76 Hun, 200; 27 N. Y. Supp. 813; *Graves v. Cameron*, 9 Daly, 152; *Life v. McClevey*, 41 Ill. App. 58; *Cressey v. Tatom*, 9 Or. 541. See, however, *N. Y. Life Ins. Co. v. Aitkin*, 125 N. Y. 660; 26 N. E. 732; *Cutler v. Wright*, 22 N. Y. 472; *Smith v. Whitaker*, 23 Ill. 367; *Sloan v. Torrey*, 78 Mo. 623. This presumption is applicable only to States which were settled by English colonists, and whose jurisprudence is founded on the common law, *Johnson v. State*, 60 Ark. 308; 30 S. W. 31; *Clark v. Barnes*, 58 Mo. App. 667; and it is, therefore, inapplicable, *e. g.*, to Texas, *Brown v. Wright* (Ark.), 22 S. W. 1022; to Kansas, *Bain v. Arnold*, 33 Mo. App. 631; or to the Creek nation, *Davidson v. Gibson*, 56 Fed. Rep. 443; 5 C. C. A. 543.

The Courts of one State will accept the construction given to the statutes of another State by the Courts of the latter. *Van Matre v. Sankey*, 148 Ill. 536; 36 N. E. 628; *Fitzsimmons v. Johnson*, 90 Tenn. 416; 17 S. W. 100; *Gilchrist v. O. & O. L. Co.* 21 W. Va. 115; 45 Am. Rep. 555. See, however, as to a decision reversing a prior construction on the faith of which obligations have been contracted, *Jessup v. Carnegie*, 80 N. Y. 441; 36 Am. Rep. 643. The decision of the Austrian ministry of commerce as to the term of Austrian patents will be accepted as a construction of Austrian law. *Consolidated Roller Mill Co. v. Walker*, 43 Fed. Rep. 575.

As to the mode of proving foreign laws, see *Ennis v. Smith*, 14 How. 400; *Dauphin v. United States*, 6 Ct. of Cl. 221; *Emery v. Berry*, 8 Fost. (N. H.) 486; *Barkman v. Hopkins*, 6 English (Ark.), 157; *Ames v. McCamber*, 124 Mass. 85; *The Pawashick*, 2 Lowell, 142; *Leach v. Linde*, 70 Hun, 145; 24 N. Y. Supp. 176; *Burrows v. Downs*, 9 R. I. 447; *People v. Calder*, 30 Mich. 87; *Wharton, Conf. of L.*, 2nd ed., ss. 772-778.

Exemption laws are treated as statutes affecting the remedy. *Burlington & Missouri River R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497. Questions of exemption are, therefore, governed by the *lex fori*. *Burlington & Missouri River R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497; *Railroad Co. v. Smith*, 70 Miss. 344; 12 So. 461; *Seay v. Palmer*, 93 Ala. 381; *Mooney v. Railway Co.* 60 Iowa, 346; 14 N. W. Rep. 343. Though the debtor and creditor reside in the same State, the exemption laws of that State do not control garnishment proceedings in another State. *Burlington & Missouri River R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497; *Stevens v. Brown*, 20 W. Va. 450; *Gibbs v. Logan*, 22 W. Va. 208; *Mooney v. Union Pacific R. R. Co.* 60 Iowa, 346; 14 N. W. 343; *Broadstreet v. Clark*, 65 Iowa, 670; *Lyon & Co. v. Callopy*, 87 Iowa, 576; *Stewart v. Thompson* (Ky.), 31 S. W. 133; *Atchison, T. & S. F. R. Co. v. Maggard* (Colo. App.), 39 Pac. 985; *Carson v. R. R. Co.* 88 Tenn. 646; 13 S. W. 588, disapproving 36 Wis. 288. See, how-

ever, *Drake v. L. S. & M. S. Ry. Co.* 69 Mich. 168 (and cases cited), holding that where a creditor, with a view to evade the attachment laws of his own State, assigns a debt to a person in another State, the exemption under the laws of the former State follows the debt and attaches itself to every process of collection in the latter State, unless jurisdiction is obtained of the person of the principal debtor. Garnishment of a corporation in one State for wages due for services performed in another State is no defence to a suit by the laborer in the latter State, of which he is a resident, for the recovery of his wages. *Missouri Pac. Ry. Co. v. Sharitt*, 43 Kan. 375; 23 Pac. 430; *Railroad Co. v. Smith*, 70 Miss. 344; 12 So. 461. But a judgment recovered in the latter State, in such a case, would bar an attachment in another State. *Wells v. East Tennessee, Virginia &c. R. R. Co.* 74 Ga. 548. A Court may enjoin a resident from proceeding in another State in evasion of the exemption laws of his own State, *Hager v. Adams*, 70 Iowa, 746; *Morton v. Hull*, 77 Tex. 80; *Allen v. Buchanan*, 97 Ala. 399; *Harwell v. Sharp* (Ga.), 11 S. E. 561; *Keyser v. Rice*, 47 Md. 213; *Snook v. Snetzer*, 25 Ohio St. 519; *Alleghany &c. Co. v. Weidenfeld*, 5 Misc. Rep. 43; 25 N. Y. Supp. 71; *Dehon v. Foster*, 4 Allen, 550; or may permit a creditor to recover from an attaching creditor money obtained by the latter in another State in violation of the exemption laws of his own State. *Singer Mfg. Co. v. Fleming* (Neb.), 58 N. W. 226. But if the debtor and the creditor are domiciled in different States, the Courts of the debtor's State will not restrain the creditor, if he is found within the jurisdiction, from proceeding by attachment in his own State. *Griffith v. Langdale*, 53 Ark. 71. A non-resident debtor cannot invoke the exemption laws of the State in which his property is attached, unless they so provide. *Leiber v. U. P. R. Co.* 49 Iowa, 688; *Kyle v. Montgomery*, 73 Ga. 337; *American Cent. Ins. Co. v. Hettler*, 46 Ill. App. 416.

As to the situs of a debt for purposes of attachment, see *Renier v. Hurlbut* (Wis.), 50 N. W. 783; *Singer Mfg. Co. v. Fleming* (Neb.), 58 N. W. 226; *Green's Bank v. Wickham*, 23 Mo. App. 663; *Bush v. Nance*, 61 Miss. 237 (as to a commission merchant's account for advances).

APPENDIX.

NOTE 1.

LAW GOVERNING ACTS DONE IN UNCIVILISED COUNTRIES.

THE Rules in this Digest apply only to rights acquired under the law of a civilised country. What, however, is the law, if any, which in the opinion of English Courts governs transactions taking place in an uncivilised country, *e. g.*, in the Soudan, or in some part of the world not under the sovereignty of any ruler recognised by European law?

The question is one which may at times come before an English Court;¹ it is also one to which, in the absence of decisions, nothing like a final answer can be given; all that can be done is to note a few points, as to the matter before us, on which it is possible to conjecture, at any rate, what would be the view taken by English Courts.

We may assume that the legal effect of a transaction taking place, *e. g.*, a contract made, in an uncivilised country could not come before an English Court unless one of the parties at least were the subject of some civilised state.

(1) *As to domicil.* — An Englishman — and probably the citizen of any civilised country — does not, it would seem, by fixing his permanent residence, or settling in an uncivilised country, acquire, for legal purposes, a domicil in such country. A domiciled Englishman who settles in China, and *à fortiori* who settles in a strictly barbarous country, retains his English domicil. *A*, an Englishman, was settled at Shanghai. “In these circumstances it was admitted by the petitioner’s counsel [in a case as to liability to legacy duty] that they could not contend that the testator’s domicil was Chinese. This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil, and brings the case within the principles laid down by Lord Stowell in his celebrated judgment in *The Indian Chief* [1801, 3 Rob. Ad. Cas. 29], and by

¹ Compare *Brinkley v. Attorney-General*, 1890, 15 P. D. 76; *Bathell v. Hildyard*, 1888, 38 Ch. D. 220; *In re Tootal’s Trusts*, 1883, 23 Ch. D. 532; *Companhia de Mocambique v. British South Africa Co.* [1892] 2 Q. B. (C. A.) 358.

"Dr. Lushington in *Maltass v. Maltass*" [1844, 1 Rob. Ecc. Cas. 67, 80, 81].¹

The principle laid down or suggested in these words by Mr. Justice Chitty — namely, that settlement in an uncivilised country does not change the domicile of the citizen of a civilised country, or at any rate of a domiciled Englishman — goes (if it can be maintained) some way towards solving one or two difficult questions, *e. g.*, What is the law governing the validity of a will made in an uncivilised country by an Englishman domiciled in England?

(2) *As to marriage*. — A marriage made in a strictly barbarous country between British subjects, or between a British subject and a citizen of a civilised country, *e. g.*, an Italian, and it would seem even between a British subject and a native of such uncivilised country, will, it is submitted, be held valid as regards form, if made in accordance with the requirements of the English common law; and it is extremely probable that, with regard to such a marriage, the common law might now be interpreted as allowing the celebration of a marriage *per verba de præsenti* without the presence of a minister in orders.² A local form,³ also, if such there be, would seem to be sufficient, at any rate where one of the parties is a native. It is, however, essential that the intention of the parties should be an intention to contract a "marriage" in the sense in which that term is known in Christian countries, *i. e.*, the union of one man to one woman for life to the exclusion of all others.⁴ Capacity to marry would apparently depend upon the law of the domicile of the parties, or perhaps more strictly of the husband.⁵

(3) *As to contract*. — Capacity⁶ to contract must, it would seem, depend upon the law of the domicile of the parties to the agreement. If either of the parties were under an incapacity by the law of his domicile to enter into a contract, an agreement made by him in an uncivilised country would probably not be enforceable against him in England. This we may be pretty certain would be the case were the party under an incapacity an English infant domiciled in England.

The formalities of a contract probably, and its effect almost certainly, would, under the circumstances supposed, be governed by the proper law of the contract, *i. e.*, by the law contemplated by the parties. Suppose *X* and *A* enter into a contract in the Soudan. If the contract is to be performed in England, the incidents would be gov-

¹ *In re Tootal's Trusts*, 1883, 23 Ch. D. 532, 534, judgment of Chitty, J. Semble, however, that the cases do not show that an Englishman might not for legal purposes acquire a domicile in such a country as China. All they actually establish is the strength of the presumption against his intending to acquire a domicile in China, or rather to subject himself to Chinese law.

² Compare *Reg. v. Millis*, 1844, 10 Cl. & F. 534, and *Culling v. Culling*, [1896] P. 116, with *Catterall v. Catterall*, 1847, 1 Rob. Ecc. 580, and *Wharton*, 2nd ed., s. 172, note 2.

³ See Rule 169, p. 626, ante.

⁴ *Brinkley v. Attorney-General*, 1890, 15 P. D. 76, contrasted with *Bethell v. Hildyard*, 1888, 38 Ch. D. 220.

⁵ See *Sottomayor v. De Barros*, 1877, 3 P. D. (C. A.) 1, 1879, 5 P. D. 94.

⁶ See Rule 146, p. 543, ante.

erned by English law; whilst, if it is to be performed in Germany, its incidents would be governed by German law.¹

(4) *As to alienation of movables.* — If the movables are at the time of the alienation situate in the barbarous country, probably English Courts might hold that the alienation must, in order to be valid, be one which, if made in England, would be valid according to the English common law. There is little doubt that if, though the alienation takes place in an uncivilised country, the movables alienated are situate in a civilised country, the validity of the alienation would depend on the law of that country (*lex situs*).²

(5) *Torts.* — When an act which damages *A* or his property is done by *X* in a barbarous country, the character of the act cannot depend on the law of the country where it is done. If both *X* and *A* are domiciled in England, the act is probably wrongful and actionable in England, if it would have been tortious if done in England. If the two parties are domiciled, the one in England and the other, *e. g.*, in Germany, then the act is probably actionable in England, if it be one which is wrongful both according to the law of England and according to the law of Germany. But we can here be guided by nothing but analogy, and all we can do is to consider how far the rules which govern the possibility of bringing an action in England for a tort committed in a foreign and civilised country³ can by analogy be made applicable to an action for a tort committed in an uncivilised country. An action cannot be maintained in England for a trespass to land in an uncivilised country.⁴

(6) *Procedure.* — An action in England in respect of any transaction taking place in an uncivilised country is clearly, as regards all matters of procedure, governed by English law.⁵

On most of the points, however, considered in this Note, and many others which might suggest themselves, we must trust wholly to conjecture, and must admit that what is the law, if any, governing transactions taking place in an uncivilised country, is in many instances a matter of absolute uncertainty. If, for example, *X*, an Englishman domiciled in England, whilst in an uncivilised country promises *A*, a Scotchman domiciled in Scotland, out of gratitude for some past service, to pay *A* £10 on their return home, is the promise governed by English law, and therefore invalid for want of a consideration, or by Scotch law, under which, apparently, it may be valid? How, again, if the position of the parties had been reversed, and the promise had been made by *A*, the Scotchman domiciled in Scotland, to *X*, the Englishman domiciled in England? To these and similar inquiries no certain reply is, it is conceived, possible.

¹ See Rules 148, 149, pp. 553, 563, *ante*.

² See Rules 140, 141, pp. 530, 533, *ante*.

³ See Rules 174-176, pp. 659-660, *ante*.

⁴ *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602.

⁵ See Rule 188, p. 711, *ante*.

NOTE 2.

PREFERENCE OF ENGLISH COURTS FOR *LEX LOCI CONTRACTUS*.

It is laid down in the foregoing pages that a contract is often governed, not by the law of the place where it is made (*lex loci contractus*), but by the law of the place where it is to be performed (*lex loci solutionis*).¹ The reports, however, and text-books of authority, reiterate the maxim that a contract is governed by the law of the place where it is made.

The apparent contradiction between these statements is little more than verbal, and may be explained by the history of English judicial legislation with regard to the conflict of laws.

English judges, when, about a century and a half ago, they were for the first time called upon to deal frequently with the conflict of laws, no doubt conceived that matters of form, matters of substance, and, in short, everything connected with a contract, except matters of procedure, were governed by the *lex loci contractus*, and these words they interpreted as meaning "the law of the place where the contract was made." The adoption of a formula which they somewhat misinterpreted has influenced to a limited degree the substance of their decisions, especially with regard to the validity of a marriage.² It has still more influenced the language in which English judgments have been and are expressed. For English Courts soon found it necessary, when interpreting contracts which contained in them some foreign element, to give effect to other laws besides the law of the place where the contract was made, and especially, as regards the mode of performing a contract, to the law of the place of performance (*lex loci solutionis*). This change of doctrine was, as often happens in the case of judicial legislation, combined with verbal adherence to an old formula not really consistent with the new theory. The expression *lex loci contractus* was retained, but was re-interpreted so as to mean "not the law of the country where a contract was made," but the "law of the country with a view to the law whereof a contract was made."³ This law may be the law of the country where a contract was made, but may, it is manifest, be the law of some other country, and is very frequently the law of the country where the contract is to be performed. The same result was sometimes attained by another method of reasoning. It was laid down that a person must be assumed to have contracted at the place where his contract was to be performed. By either method of interpretation an actual reference to the law contemplated by the parties, which was more often than not the *lex loci*

¹ See Rule 149 and Sub-Rules thereto, pp. 563-570, *ante*.

² See Rule 169, and comment thereon, pp. 626-639, *ante*.

³ For the transition from the older to the later and more correct doctrine, see *Rothschild v. Currie*, 1841, 1 Q. B. 43, 49; *Allen v. Kemble*, 1848, 6 Moore P. C. 314, 322, with which compare *Story*, ss. 242, 263, 272, 282, 314, 315.

solutionis, was masked, as it still often is in English decisions and text-books, under a nominal reference to the law of the place of the contract. The substitution of the law of the place of performance (*lex loci solutionis*) for the law of the place where a contract was made (*lex loci celebrationis*) was the easier, because, in the vast majority of instances, persons intend that their contracts shall be performed in the country where they are made. The law, therefore, governing a contract may often, with almost equal propriety, be described as the *lex loci solutionis* or the *lex loci celebrationis*. The adherence, however, to the term *lex loci contractus* has produced two effects. It has, till comparatively recent years, concealed from English lawyers the principle that the interpretation, as contrasted with the formal validity, of a contract is governed not by the law of the place where the contract is made, but by the law (of whatever country) contemplated by the parties, and that this law is constantly the *lex loci solutionis*. It has, further, led English judges to give a preference to the law of the country where a contract is made. Where the law governing the incidents of a contract is doubtful, our Courts fall back upon the law of the place where a contract is made (*lex loci contractus*), whilst foreign jurists, it would seem, tend to fall back on the law of the place where the contract is to be performed (*lex loci solutionis*). Both English judges and foreign Courts or writers, however, in fact, adopt one principle, though they apply it somewhat differently.¹ This is that the interpretation of a contract and the obligations arising under it are, in so far as they depend on the will of the parties, to be determined in accordance with the law contemplated by the parties.

NOTE 3.

DEFINITION OF DOMICIL.

I. DEFINITION PROPOSED IN THIS TREATISE.

A person's home or domicile, in so far as it is not determined by a direct rule of law,² is here defined as the place or country either (i) in which he in fact resides with the intention of residence, or (ii) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence (*animus manendi*), or (iii) with regard to which, having so resided there, he retains the intention of residence (*animus manendi*), though he in fact no longer resides there; or (using the word "abandon" in the strict sense given it throughout these pages) as the place or country in which a person resides with the *animus manendi*, or intention of residence, or which, having so resided in it, he has not abandoned.³

Any one who bears in mind the explanations of the terms "resi-

¹ *Hamlyn v. Talisker Distillery*, [1894] A. C. 202, 212, language of Lord Watson.

² Compare Rule 1, p. 79, *ante*, and p. 81, *ante*.

³ See pp. 81, 83, *ante*.

dence" and "*animus manendi*" given in this treatise will perceive at once that the proposed definition lays no claim to originality, but is simply an attempt to render into somewhat precise terms definitions which have been already in substance suggested by authors of eminence, such as Savigny, Story, and Phillimore. He will also perceive that this definition, in common with most of the received definitions of the term "domicil," leaves out of account the cases in which a domicil is directly created by operation of law. This omission is intentional. To define "domicil" when created by operation of law would be simply to enumerate the cases in which rules of law create what may be termed conventional domicils. These rules cannot easily be reduced to a simple formula, and the attempt to enumerate them under a general definition of "domicil" would needlessly embarrass the admittedly difficult attempt to explain the meaning of "domicil" as created by or dependent upon a person's own act. It is well, however, to bear in mind that definitions of "domicil" do not in general include cases of domicil created by operation of law, and that with such cases this Note has no concern.

II. OTHER DEFINITIONS COMPARED.

(A) *Definition of Roman Law.* — "*In eodem loco singulos habere domicilium non ambigitur, ubi quis larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, unde cum profectus est peregrinari videtur, quo si rediit peregrinari jam destitit.*"¹

This celebrated definition is, as has been remarked,² not so much a logical definition as a rhetorical description of a home. The "place" to which it applies is rather a house than a country, and its terms cannot be so twisted as to suit the domicil known to English lawyers. It includes, however, the essential constituents of a home, viz., residence and the *animus manendi*, and has the further merit of covering the cases in which domicil is retained without actual residence.

(B) *Vattel's Definition.* — Domicil is "an habitation fixed in some place with an intention of remaining there always."³

As remarked by Story, this definition is improved by substituting for the latter part of it the expression "without any present intention of removing therefrom;"⁴ but even with this amendment it hardly covers the case where a domicil once acquired is retained, either by actual residence after the *animus manendi* has ceased to exist, or by the intention to reside after actual residence has come to an end.

(C) *Denizart's Definition.* — The domicil of the person is "the place where a person enjoys his rights, and establishes his abode, and makes the seat of his property."⁵

¹ *Cod.*, lib. X., tit. xxxix. 7.

² See *Lord v. Colvin*, 1859, 28 L. J. (Ch.) 361, 365, judgment of *Kindersley*, V. C.

³ *Vattel, Droit des Gens*, liv. i., c. xix., s. 218, *Du Domicile*.

⁴ See *Story*, s. 43.

⁵ *Encyclop. Moderne*, Art. *Domicil*.

(D) *Pothier's Definition*. — "The place where a person has established the principal seat of his residence and of his business."¹

(E) *Definition of French Code*. — "Le domicile de tout Français, quant à l'exercice de ses droits civils, est au lieu où il a son principal établissement."²

(F) *Definition of Italian Code*. — "Il domicilio civile di una persona è nel luogo in cui essa ha la sede principale dei propri affari ed interessi.

"La residenza è nel luogo in cui la persona ha la dimora abituale."

These definitions rather lay down a rule of evidence for determining what is the place where a person is to be considered to have his domicile than define the meaning of the term. They belong to a system of law which determines a person's legal home by the existence of some one fact, such as his carrying on business in a particular place. There is much to recommend this mode of fixing a person's legal home, but it is not adopted by our Courts. The Italian definition coincides, it may be noticed, with the definition propounded in this treatise, in so far as it bases the description of "domicil" upon the definition of residence, and, further, defines residence itself in terms not very unlike those employed in this treatise.⁴

(G) *Savigny's Definition*. — "That place is to be regarded as a man's domicile which he has freely chosen for his permanent abode [and thus for the centre at once of his legal relations and his business]."⁵

This definition brings into prominence exactly the point neglected by most writers, viz., the element of choice or intention. The words enclosed in brackets appear superfluous, since they point to a consequence of the place being a permanent abode.

The definition agrees in substance with that proposed in this work, but is too general in its terms to be of service to English lawyers, and though, if rightly understood, correct, might, at any rate as translated into English, mislead. For the expression "freely chosen," which probably only means that the residence must be a consequence of choice, whatever the motives for that choice, might give rise to the perplexities which have flowed from the use of the word "voluntary;"⁶ and the terms of the definition might be taken to imply (what is certainly not Savigny's intention) that an Englishman, who had made up his mind to emigrate to America and settle there, acquired an American domicile by his "free choice of America as a permanent abode" before he leaves England.

(H) *Story's Definition*. — "That place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom."⁷

¹ *Pothier, Introd. Gén. Cout. d'Orléans*, ch. 1., s. 1, Art. 8.

² *Code Civil*, Art. 102.

³ *Codice Civile del Regno d'Italia*, Tit. II. 16.

⁴ See p. 80, ante.

⁵ *Savigny*, s. 353, *Guthrie's transl.*, 2nd ed., p. 97.

⁶ See pp. 108, 109, 143-146, ante.

⁷ *Story*, s. 43.

This definition deserves particular attention, both from the celebrity of the author and from the influence it has had on English decisions. It may be considered to approach more nearly than any other to an approved or authorised description of "domicil."¹ It has the merit of pointing to the negative nature of the intention or purpose on which domicil depends. Taken with the explanations with which it is accompanied in Story's work, it forms by no means a bad description of "domicil," but Story himself probably did not intend to attempt (what he very rarely aims at) a precise definition. Looked at in that light, his language would not, it is submitted, be accurate. His words hardly include the case of an Englishman resident for years abroad, yet still retaining his English domicil. It could certainly not in ordinary language be said to be a habitation from which he had no intention of removing.

(I) *Phillimore's Definition*. — "A residence at a particular place, accompanied with [positive or presumptive proof of] an intention to "remain there for an unlimited time."²

This definition is, except for the words printed in brackets, in substance the same as Story's. These words, however, might be with advantage omitted. They are at best superfluous, for the maxim *de non apparentibus et non existentibus eadem est ratio* is in law of universal application, and a fact which cannot be proved to exist has, for legal purposes, no existence. They, moreover, tend to confuse together the inquiry, What is the nature of the fact constituting domicil, or, in other words, its definition? with the different question, What is the evidence by which the existence of this fact, when its nature is known, can be proved? It is, however, easy to conjecture what it is which has induced so distinguished a writer as Sir Robert Phillimore to introduce into his definition of "domicil" terms which are, to say the least, superfluous. They are apparently intended to cover the cases in which a person's domicil is determined by a fixed rule of law independently of his own act. The author of the definition probably considers that in such instances the rule of law may be best represented as a rule of evidence affording positive or presumptive proof that a person to whom a domicil is assigned in a particular country by operation of law is there domiciled.

(J) *Vice-Chancellor Kindersley's Definition*. — "That place is "properly the domicil of a person in which he has voluntarily fixed "the habitation of himself and his family, not for a mere special and "temporary purpose, but with a present intention of making it his "permanent home, unless and until something (which is unexpected "or uncertain) shall occur to induce him to adopt some other permanent home."³

This definition lacks precision, and does not accurately point out

¹ See, e. g., *Attorney-General v. Kent*, 1862, 1 H. & C. 21; 31 L. J. Ex. 391, 396, judgment of *Martin*, B.

² *Phillimore*, s. 49.

³ *Lord v. Colvin*, 1859, 28 L. J. (Ch.) 361, 366, per *Kindersley*, V. C. See, for an unfavourable criticism on this definition, *Moorhouse v. Lord*, 1863, 10 H. L. C. 272; 32 L. J. (Ch.) 295, 298, 299, judgment of Lord *Chelmsford*.

the conditions under which a domicile may be retained; still it has the great merit of fixing attention on the nature of the purpose or state of mind on which the acquisition or maintenance of a domicile depends.

The definitions of Savigny, Story, Phillimore, and Vice-Chancellor Kindersley, though framed with different degrees of precision, each define domicile by analysing it into its essential characteristics, viz., residence, combined or connected with the intention of permanent residence or the *animus manendi*. They are each, it is submitted, consistent with each other and with the definition propounded in this treatise.

III. CRITICISMS ON ATTEMPTS TO DEFINE DOMICIL.

English judges have certainly not underrated the difficulty of defining the term "domicil." Their language, on the contrary, generally points to the two conclusions, — first, that a satisfactory definition of domicile is from the nature of things unattainable; and, secondly, that, even if the term be definable, every attempt to obtain a serviceable definition has hitherto ended in failure.

Each of these opinions, with the grounds on which it is supported, deserves careful consideration.

The opinion that the word "domicil" does not admit of definition has been expressed by eminent judges in the following terms: —

"Domicil," it has been said, means "permanent home, and, if that 'was not understood by itself, no illustration would help to make it 'intelligible.'"¹ "Any apparent definition, such as a man's 'settled habitation,' or the like, would," it has been urged, "always terminate in the ambiguity of the word 'settled,' or its equivalent, depending for their interpretation on the intention of the party, which 'must be collected from various *indicia*.'"² "With respect to these 'questions of domicile, there is no precise definition of that word, or 'any formula laid down by the application of which to the facts of 'the case it is possible at once to say where the domicile may be.'"³ "I find it," says another very eminent judge, "stated in Dr. Phillimore's book that Lord Alvanley commends the wisdom of a great 'jurist of the name of Bynkershoek in not giving a definition of '[domicil], and certainly it is extremely difficult for any one to give 'a simple definition to that word.'"⁴

The opinion which these dicta embody is, however, in spite of the eminence of its supporters, one in which it is on logical grounds hard to acquiesce. To define a word is simply to explain its meaning, or, where the term is a complex one, to resolve it into the notions of which it consists. The only insuperable obstacles to definition would seem on logical grounds to be, either that a term is of so complex a

¹ *Whicker v. Hume*, 1858, 28 L. J. (Ch.) 396, 400, per Lord Cranworth. Compare *Moorhouse v. Lord*, 1863, 32 L. J. (Ch.) 295, 298, language of Lord Chelmsford, and *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 449.

² *Forbes v. Forbes*, 1854, 23 L. J. (Ch.) 724, 726, per Wood, V. C.

³ *Cockrell v. Cockrell*, 1856, 25 L. J. (Ch.) 730, 731, per Kindersley, V. C.

⁴ *Attorney-General v. Rowe*, 1862, 31 L. J. (Ex.) 314, 319, per Bramwell, B.

nature that language does not avail to unfold its meaning (or, in other words, that the term is in the strict sense incomprehensible), or that it connotes an idea so simple as not to admit of further analysis. Neither of these obstacles can, it is conceived, hinder the definition of the term "domicil." It is certainly not the name of any notion so complex that it cannot be rendered into language. It is certainly, again, not the name for an idea so simple as not to admit of further analysis. The expression, for example, "permanent home," which is often used as its popular equivalent, is clearly a complex one, which needs and may receive further explanation.

Nor are the reasons suggested for holding that domicil is indefinable by any means conclusive. The objection often made in various forms, that any definition must terminate in the ambiguity of the word "settled" or its equivalent, may be a proof that the process of definition has to be pushed farther than it has hitherto been carried, but does not show either that definitions already made are, as far as they go, inaccurate, or still less that the attainment of a complete definition is impossible. The perfectly sound remark, again, that no formula can be laid down by the application of which to the facts of the case it is possible at once to say where a person's domicil may be, points, not to any necessary defect in the definition of the term, but to the narrow limits within which definition, however perfect, can be of practical utility. Any term the meaning of which involves a reference to "habit" or to "intention" will always be difficult of application. No definition can ever remove the difficulty of determining in a particular case what number of acts make a course of action habitual, or what is the evidence from which we may legitimately infer the existence of intention. Difficulties similar in kind, if not in degree, to those which attend the application of any definition of domicil to the facts of the case arise whenever questions as to "possession" or as to "intention" require to be answered by the Courts. The peculiar difficulty of dealing with the term "domicil" arises, it is apprehended, from its being a term the meaning of which involves a reference both to habit and to intention; while the intention, viz., the *animus manendi*, is one of a very indefinite character, and as to the existence of which the Courts often have to decide without possessing the data for a reasonable decision.

The admission, in fact, that domicil depends on a relation between "residence" and "the intention of residence," or, to use the words of Lord Westbury, that "domicil of choice is a conclusion or inference "which the law derives from the fact of a man fixing voluntarily his "sole or chief residence in a particular place, with an intention of "continuing to reside there for an unlimited time,"¹ is, it is conceived, a virtual concession that a definition of domicil is, at any rate, possible. When his lordship adds that "this is a description of the "circumstances which create or constitute a domicil, and not a defini-

¹ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 458. And compare *Bell v. Kennedy*, 1868, *Ibid.*, 307, 319; *Cockrell v. Cockrell*, 1856, 25 L. J. (Ch.) 730, 731, 732; *Lysall v. Paton*, 1856, *Ibid.*, 746, 739.

"tion of the term," there is a difficulty in following his reasoning, for such a description, if accurate, is an explanation, or, in other words, a definition, of what is meant by domicile. It is, at any rate, the only kind of definition which a lawyer need care to frame.

The prevalent opinion that no attempt to define domicile has been crowned with success deserves careful consideration. For, if the opinion be well founded, the conclusion naturally suggests itself that, where writers of great eminence have failed, success is practically unattainable, whilst the mere existence of the opinion in question appears, at first sight, to be something like a guarantee that it rests on sound foundations. Hence it is worth while to consider what are the grounds on which the belief that the existing definitions of domicile are unsatisfactory is based, and whether it be possible to find an explanation for the existence of this belief, which, without impugning the sagacity of those by whom it has been entertained, leaves its truth at least open to doubt.

English tribunals have tested every definition of domicile by what undoubtedly is, subject to one condition, the true criterion, at any rate in an English Court, of the soundness of such a definition, viz., whether it includes all the cases in which it has been judicially decided that a person has, and excludes all the cases in which it has been judicially decided that a person has not, a domicile in a particular country; and it is because judges have found that no received definition has stood this test, that they have pronounced every existing definition defective, and have all but despaired of the possibility of framing a sound definition. The condition, however, of the validity of this criterion is, that the cases by which a definition is tested should be really inconsistent with the definition, and that the cases themselves should be decided consistently with generally admitted principles. For if a definition is really applicable to cases which at first sight seem inconsistent with it, or if the decisions by which it is tested are themselves in principle open to doubt, the difficulty which arises in applying the definition is in reality a strong testimony to its essential soundness. The matter, then, for consideration is whether the test applied to the definitions of domicile has fulfilled the condition on which its validity depends.

Definitions of domicile have made shipwreck on three distinct sets of cases, which may, for the sake of brevity, be described as "Anglo-Indian Cases," "Allegiance Cases," and "Health Cases."

(A) *Anglo-Indian Cases*.¹—A series of decisions beginning, in 1790, with *Bruce v. Bruce*,² and ending, in 1865, with *Jopp v. Wood*,³ decided that an officer in the service of the Company was domiciled in India. It was as clear, in ninety-nine instances out of a hundred, as such a thing could be, that a servant of the Company did not intend to make India his permanent home.⁴ It was, there-

¹ See pp. 149-151, *ante*.

² 2 B. & P. 229.

³ 4 De G. J. & S. 616; 34 L. J. Ch. 212. See also, *In re Tootal's Trusts*, 1883, 23 Ch. D. 532.

⁴ *Allardice v. Oswald*, 1864, 33 L. J. Ch. 434, 436, judgment of *Kindersley*, V. C.

fore, in the strictest sense impossible that any definition which made the existence of domicile depend on the *animus manendi* should justify the decisions as to Anglo-Indian domicile. No accuracy of terms or analysis of the meaning of the word could by any possibility achieve this result. As long, therefore, as the Anglo-Indian cases were held to be correctly decided, English judges were inevitably driven to the conclusion that every received definition of domicile, such, for example, as Story's, was incorrect. The courts, however, have now pronounced the Anglo-Indian cases anomalous, or, in other words, have held that these cases were in principle wrongly decided, though their effect could now be got rid of only by legislative action.¹ The Anglo-Indian cases, therefore, do not fulfil the condition necessary to make them a test of a definition of domicile.²

(B) *Allegiance Cases*.³—The doctrine was at one time laid down⁴ that a change of domicile involves something like a change of allegiance, and that, for instance, an Englishman, in order to acquire a French domicile, must at any rate, as far as in him lies, endeavour to become a French citizen. This doctrine was strictly inconsistent with the theory, on which the received definitions of domicile are based, that a domicile is merely a permanent home. As long, therefore, as this doctrine was maintained, it was impossible for English judges to treat as satisfactory any of the current definitions of domicile. The attempt, however, to identify change of domicile with change of allegiance has now been pronounced on the highest authority a failure.⁵ The allegiance cases, therefore, are not entitled to weight, and are no criterion of the correctness of a definition of domicile.

(C) *Health Cases*.⁶—Dicta, though not decisions, may be cited as showing that a change of residence made by an invalid for the sake of his health cannot effect a change of domicile. This doctrine, if adopted without considerable limitations, makes domicile depend upon the motive, and not upon the intention, with which a person changes his residence. It is, therefore, inconsistent with, and throws doubts upon, the correctness of any definition of domicile depending upon the combination of residence and *animus manendi*. The doctrine, however, is now shown by the one decided case on this subject⁷ to be either unfounded, or else to be explainable in a manner perfectly consistent with the ordinary definitions of domicile.

A result, therefore, of the examination of the three sets of cases by which definitions of domicile have been tested and found wanting is, that no one of these sets fulfils the conditions necessary to make it

¹ *Jopp v. Wood*, 1865, 34 L. J. (Ch.) 212; 4 De G. J. & S. 616; *Drevon v. Drevon*, 1864, 34 L. J. (Ch.) 129, 134.

² Compare *In re Tootal's Trusts*, 1883, 23 Ch. D. 532, and *Abd-ul-Messih v. Farra*, 1888, 13 App. Cas. 431, as also *Westlake*, 3rd ed., pp. 314, 315, s. 265.

³ See pp. 111, 112, *ante*.

⁴ *Moorhouse v. Lord*, 1863, 10 H. L. C. 272; 32 L. J. (Ch.) 296; *Whicker v. Hume*, 1858, 7 H. L. C. 124; 28 L. J. (Ch.) 396.

⁵ *Udny v. Udny*, 1869, L. R. 1 Sc. App. 441, 452, judgment of *Hatherley*, Ch.; *Douglas v. Douglas*, 1871, L. R. 12 Eq. 617.

⁶ See pp. 143-146, *ante*.

⁷ *Hoskins v. Matthews*, 1856, 25 L. J. (Ch.) 699; 8 De G. M. & G. 13.

the criterion of a definition, and that the difficulty which has been found in reconciling several definitions with the Anglo-Indian cases, the allegiance cases, and the health cases, tells rather in favour of than against the correctness of the definitions, which, because they could not cover these cases, were naturally thought incorrect and unsatisfactory.

A survey, in short, of the attempts which have been made to define domicile, and of the criticisms upon such attempts, leads to results which may be summed up as follows:—

First. Domicil, being a complex term, must from the nature of things be capable of definition. In other words, it is a term which has a meaning, and that meaning can be explained by analysing it into its elements.

Secondly. All the best definitions agree in making the elements of domicile "residence" and "*animus manendi*."

Thirdly. Several of these definitions—such, for example, as Story's, Phillimore's, or Vice-Chancellor Kindersley's—have succeeded in giving an explanation of the meaning of domicile, which, even if not expressed in the most precise language, is substantially accurate.

Fourthly. The reason why English Courts have been inclined to hold that no definition of domicile is satisfactory is, that they have found it impossible to reconcile any definition with three sets of judicial decisions or dicta. When, however, these sets are examined, it is found that two of them consist of cases embodying views of domicile now admitted to be erroneous, whilst the third set can be reconciled with all the best definitions of domicile. The great difficulty, in short, which English judges have experienced in discovering a satisfactory definition arises from the fact that, when of recent years the Courts have been called upon to determine questions of domicile, they have been hampered by the almost insuperable difficulty of reconciling a generally sound theory with decisions or dicta delivered at a period when the whole subject of the conflict of laws was much less perfectly understood than at present.

NOTE 4.

COMMERCIAL DOMICIL IN TIME OF WAR.¹

I. PERSON'S CHARACTER DETERMINED BY DOMICIL.

In time of war the answer to the question whether a person is or is not to be considered an alien enemy is, in most cases at any rate, to be determined by reference, not to his nationality or allegiance, but to his trading residence or commercial domicile. Every person domiciled in a state engaged in hostilities with our own, whether he is a born subject of that state or not, is to be regarded as an alien enemy;²

¹ 1 Duer, *Insurance*, pp. 494-524; 1 Kent, 12th ed., pp. 73-81; 1 Arnould, *Marine Insurance*, 3rd ed., pp. 121-134. Compare 1 Arnould, 5th ed., pp. 134-143, edited by MacLachlan.

² 1 Arnould, 3rd ed., p. 121; *The Indian Chief*, 1801, 3 C. Rob. 12, 22.

and, speaking generally, a person domiciled in a neutral country is to be regarded as for commercial purposes a neutral, even though he be in fact a British subject, or a subject of a state at war with England.¹ "The position is a clear one, that if a person goes into a foreign country, and engages in trade there, he is, by the law of nations, to be considered a merchant of that country, and a subject for all civil purposes, whether that country be hostile or neutral; and he cannot be permitted to retain the privileges of a neutral character during his residence and occupation in an enemy's country."² A person's character, in short, as a friend or enemy, is in time of war to be determined by what is termed his commercial domicile. Persons who are commercially domiciled in a neutral country are, as far as belligerents are concerned, neutrals; whilst, on the other hand, persons commercially domiciled in a hostile country are, whatever their nationality or allegiance, to be considered enemies, for "persons resident in a country carrying on trade, by which both they and the country were benefited, were to be considered as the subjects of that country, and were considered so by the law of nations, at least so far as by that law to subject their property to capture by a country at war with that in which they lived."³ Thus, if there be a war between England and France, a British subject residing and trading in France is an alien enemy; whilst a British subject or a French citizen who resides and carries on business in Portugal is, even though he may trade with France, a neutral.

II. NATURE OF COMMERCIAL DOMICIL.

The nature of the trading residence or commercial domicile, which determines a person's friendly or hostile character in time of war, may be made clear by comparing such commercial domicile with the domicile properly so called, which is referred to in the body of this treatise, and is, in this Note, termed for the sake of distinction a civil domicile. Each domicile is a kind of residence, each bears a close resemblance to the other, but they are distinguished by marked differences.

(A) *Resemblance of commercial domicile to civil domicile.* — A trading or commercial domicile bears so close a resemblance to a civil domicile that it is often described in language which appears to identify the two kinds of domicile. Thus Arnould writes of the domicile which determines a person's character in time of war: "That is properly the domicile of a person where he has his true, fixed, permanent home and principal establishment, in which, when present, he has the intention of remaining (*animus manendi*), and from which he is never absent without the intention of returning (*animus revertendi*) directly he shall have accomplished the purpose for which he left it;"⁴ whilst Duer states with regard to the national character of a

¹ *The Danous*, 1802, 4 C. Rob. 255 (s); 1 Duer, pp. 494, 495, 520.

² 1 Kent, 12th ed., p. 75.

³ *Tabbs v. Bendelack*, 1802, 4 Esp. 106, 108, per Lord Kenyon.

⁴ 1 Arnould, *Marine Insurance*, 3rd ed., p. 121.

merchant: "It is determined solely by the place of his permanent residence. In the language of the law, it is fixed by his domicile. He is a political member of the country into which by his residence and business he is incorporated — a subject of the government that protects him in his pursuits — that his industry contributes to support, and of whose national resources his own means are a constituent part."¹ Nor are the points in which the two kinds of domicile resemble each other hard to discern. They are each kinds or modes of residence. The constituent elements of each are, first, "residence;" secondly, a "purpose or intention" (on the part of the person whose domicile is in question) "with regard to residence." In spite, however, of the terms used by high authorities, and of the undoubted likeness between the two kinds of domicile, they are different in essential particulars.

(B) *Differences between civil and commercial domicile.* — The fundamental distinction between a civil domicile and a commercial domicile is this: A civil domicile is such a permanent residence in a country as makes that country a person's home,² and renders it, therefore, reasonable that his civil rights should in many instances³ be determined by the laws thereof. A commercial domicile, on the other hand, is such a residence in a country for the purpose of trading there as makes a person's trade or business contribute to or form part of the resources of such country, and renders it, therefore, reasonable that his hostile, friendly, or neutral character should be determined by reference to the character of such country. When a person's civil domicile is in question, the matter to be determined is whether he has or has not so settled in a given country as to have made it his home.³ When a person's commercial domicile is in question, the matter to be determined is whether he is or is not residing in a given country with the intention of continuing to trade there. From this fundamental distinction arise the following differences: —

(1) *As to residence.* — Residence in a country is in general *prima facie* evidence of a person having there his civil domicile, but it is only *prima facie* evidence, the effect of which may be quite got rid of by proof that a person has never lived in the country with the intention of making it his permanent home. But residence is far more than *prima facie* evidence of a person's commercial domicile. In time of war a man is taken to be domiciled for commercial purposes in the country where he in fact resides, and, if he is to escape the effect of such presumption, he must prove affirmatively that he has the intention of not continuing to reside in such country. A long period further of residence, which, as regards civil rights, is merely evidence of domicile, might, it would seem, be absolutely conclusive in determining national character in time of war.⁴

(2) *As to intention.* — The intention, or *animus*, which, in combi-

¹ 1 Duer, p. 495.

² See p. 81, *ante*.

³ See pp. 81, 105, 106, *ante*.

⁴ 1 Duer, pp. 500, 501; *The Harmony*, 1800, 2 C. Rob. 322.

nation with residence, constitutes a civil domicile, is different from the intention or *animus* which, together with residence, makes up a commercial domicile.

The intention which goes to make up the existence of a civil domicile is the present intention of residing permanently, or for an indefinite period, in a given country.¹ The intention which goes to make up the existence of a commercial domicile is the intention to continue residing and trading in a given country for the present. The former is an intention to be settled in a country and make it one's home, the latter is an intention to continue residing and trading there. Hence, on the one hand, a person does not acquire a civil domicile by residence in a country for a definite purpose or period,² and cannot by residence in one country, *e. g.*, France, get rid of a domicile in another, *e. g.*, England, if he retains the purpose of ultimately returning to England, as his home; while, on the other hand, the intention "which the law attributes to a person residing in a hostile country, is not disproved" by evidence that he contemplated a return to his own country at "some future period. If the period of his return is wholly uncertain — "if it remains in doubt at what time, if at all, he will be able to accomplish the design, — the design, however seriously entertained, will not avail to refute the legal presumption. A residence for an indefinite period is, in the judgment of law, not transitory, but permanent. Even when the party has a fixed intention to return to his own country at a certain period, yet if a long interval of time — an interval not of months, but of years — is to elapse before his plan of removal can be effected, no regard will be had to an intention of "which the execution is so long deferred."³

D, domiciled in England, goes to British India with the full intention of residing there till he has made his fortune in trade, and of then returning to England, where he has his domicile of origin. He resides in India for twenty years. He retains his English civil domicile. Suppose, however, that *D*, under exactly similar circumstances in every other respect, takes up his residence not in British India, but in the Portuguese settlement in India, and after war has broken out between England and Portugal, continues to reside and trade in the Portuguese settlement, though still retaining his intention of ultimately returning to England. *D* thereupon acquires a Portuguese commercial domicile.

(3) *As to abandonment.* — The rules as to abandonment are different. A civil domicile once acquired can be changed only by complete abandonment in fact of the country where a person is domiciled.⁴ The intention to change, even if accompanied by steps for carrying out a change, will not, it would seem, produce a change as long as the person whose domicile is in question continues in fact to reside in the country where he has been domiciled.

¹ Pp. 80–83, 107, 108, *ante*.

² P. 110, *ante*.

³ 1 *Duer*, pp. 500, 501.

⁴ *In Goods of Raffeneil*, 1863, 32 L. J. (P. & M.) 203. See Rule 8, p. 114, *ante*.

A commercial domicil in time of war can, it would seem, be changed, under some circumstances, by the intention to change it, accompanied by steps taken for the purpose of effecting a change. "The native national character, that has been lost, or partially suspended, by a foreign domicil, easily reverts. The circumstances, by which it may be restored, are much fewer and slighter than those that were originally necessary to effect its change. The adventitious character, that a domicil imposes, ceases with the residence from which it arose. It adheres to the party no longer than he consents to bear it. It is true, his mere intention to remove — an intention not manifested by overt acts, but existing secretly in his own breast, . . . is not sufficient to efface the character that his domicil impressed; something more than mere verbal declarations, some solid fact, showing that the party is in the act of withdrawing, is always necessary to be proved; *still, neither his actual return to his own country, nor even his actual departure from the territories of that in which he resided, is indispensable.*"¹

(4) *As to domicil by operation of law.* — It may fairly be doubted whether the rules as to domicil by operation of law, *e. g.*, in the case of persons who have in fact no home, or of dependent persons, which play so large part in the law of civil domicil, can be without considerable limitations applied to the ascertainment of commercial domicil. *D*, for example, is a French subject, whose domicil of origin is English. He has an acquired domicil in France. Both France and America declare war against England. *D* thereupon leaves France, intending to settle in New York. He resumes during the transit from one country to another his domicil of origin;² but it can hardly be supposed that he is not during such transit an alien enemy. *D*, again, is an infant, or a married woman, carrying on a commercial business on his or her own account in France during a war with England. It can hardly be maintained that the fact of the father in the one case, or the husband in the other, having an English domicil and being resident in England will free *D* from the character of an alien enemy.

(5) *As to special rules.* — There are one or two rules as to commercial domicil which can have no application to an ordinary civil domicil. Thus, according to American decisions at least, an American citizen (and the same principle would perhaps be applied by English Courts to British subjects) cannot, by emigration from his own country during the existence of hostilities, acquire such a foreign domicil as to protect his trade during the war against the belligerent claims either of his own country or of a hostile power.³ So, again, a neutral merchant may, at any time, withdraw his property and funds from a hostile country, and such a withdrawal may restore him to his neutral domicil. But whether the subject of a belligerent state can, after the outbreak of hostilities, withdraw from a hostile state so as to escape the imputation of trade with the enemy is doubtful. If

¹ 1 *Duer*, pp. 514, 515.

² Pp. 117-119, *ante*.

³ 1 *Duer*, p. 521; *The Dos Hermanos*, 1817, 2 *Wheaton*, 76.

the withdrawal can be effected at all, either it must be done within a short period after the outbreak of war, or any delay in effecting it must be shown to have arisen from necessity or from compulsion.¹

III. PERSON'S CIVIL NEED NOT COINCIDE WITH HIS COMMERCIAL DOMICIL.

From the distinctions between a civil and a commercial domicile, the conclusion follows that a person may have a civil domicile in one country, and, at the same time, a commercial domicile or residence in another. Thus, suppose that *D*'s domicile of origin is English, and that he goes to France and sets up in trade there without any purpose of making France his permanent home, but with the distinct intention of returning to England within ten years. He clearly retains his English domicile of origin; and the outbreak of a war between France and England does not of itself affect *D*'s civil domicile.

If *D* continues to reside and trade in France after the outbreak of hostilities, though without any change of intention as to the time of his stay in France, he will acquire a French commercial domicile. In other words, he will have a civil domicile in England and a commercial domicile in France.

Nor is this fact really inconsistent with Rule 3,² that no person can, at the same time, have more than one domicile. It only illustrates the fact constantly dwelt upon in this treatise, that residence is different from domicile, and that a person while domiciled in one country may, in fact, reside in another.

NOTE 5.

ACQUISITION, LOSS, AND RESUMPTION OF BRITISH NATIONALITY.

The statement of the law as to British Nationality in Chapter III.³ is rendered complex by the necessity for following the terms, and to a great extent the arrangement, of the Naturalization Act, 1870, as well as for mentioning some exceptions which are of no practical importance. This Note is intended to summarise in broad terms, omitting minor exceptions, the general rules as to the acquisition, etc., of British nationality.

I. ACQUISITION OF BRITISH NATIONALITY.

British nationality can be acquired in the following five modes: —

(A) By *place* of birth.

(B) By *descent*, without reference to place of birth.

¹ *The Diana*, 1803, 5 C. Rob. 60; *The Ocean*, 1804, *Ibid.*, 90; *The President*, 1804, *Ibid.*, 277; 1 *Duer*, p. 519.

² See p. 95, *ante*.

³ See p. 173, *ante*.

- (C) By the *combined* effect of *descent* and of *place of residence* during infancy.
- (D) By *marriage*, in the case of a woman.
- (E) By *naturalization* under the *Naturalization Act*, 1870, in case of a man, or (unmarried) woman of full age.

(A) *By place of birth.* — Any person who, whatever the nationality of his parents, is born within the British dominions, acquires British nationality at birth, and is a natural-born British subject.¹

This principle is not affected by the Naturalization Act, 1870. The son of French citizens, born in London or in Calcutta, is from the moment of his birth a British subject. The only respect in which his position, in regard to nationality, differs from that of a son of English parents who is born in London is that he can, when he has attained full age, renounce British nationality, and, by making a declaration of alienage, become thereupon in the eye of English law an alien.² In other words, the son of aliens, if born in the British dominions, is as much a natural-born British subject as would be the son of British subjects born within the British dominions. The difference caused by descent from parents who are aliens has reference, not to the *acquisition* but to the mode of *changing* British nationality.

The exceptional and unimportant instances in which birth within the British dominions does not of itself confer British nationality³ are due to the fact that, though at common law nationality or allegiance in substance depended on the place of a person's birth, it in theory at least depended, not upon the locality of a man's birth, but upon his being born within the jurisdiction and allegiance of the king of England; and it might occasionally happen that a person was born within the dominions without being born within the allegiance, or, in other words, under the protection and control of the Crown.⁴

(B) *By descent.* — In two cases a person acquires British nationality at birth by virtue of descent alone, without reference to the place where he is born: —

First. A child whose father was born within the British dominions is, though born outside the British dominions, himself a natural-born British subject.⁵

Secondly. A child whose father's father (paternal grandfather) was born within the British dominions is a natural-born British subject, even though the child's father and the child himself were not born within the British dominions.⁶

Three points require notice: —

The acquisition, in the first place, of nationality by descent, is foreign to the principles of the common law, and is based wholly upon statutory enactments. The statutes, in the second place, which give the

¹ See Rule 22, p. 175, *ante*.

² See Naturalization Act, 1870 (33 Vict. cap. 14), s. 4, and Rule 28, p. 186, *ante*.

³ See pp. 176, 177, *ante*.

⁴ See generally, *Calvin's Case*, 1608, 7 Rep. 1, 18 a, 18 b, and compare *De Geer v. Stone*, 1882, 22 Ch. D. 243.

⁵ See 4 Geo. II. cap. 21, s. 1, 13 Geo. III. cap. 21, and Rule 23, p. 177, *ante*.

⁶ *Ibid.*

privilege, contain certain unimportant limitations or exceptions¹ with which it is not worth while encumbering this Note. The mode, in the last place, in which these enactments have been construed by the law Courts has led to the result that a child neither whose father nor whose paternal grandfather was born within the British dominions is not himself a natural-born British subject. To put the same thing in another shape, British nationality does not pass by descent or inheritance beyond the second generation. This is noticeable because the words of the statutes 7 Anne, cap. 5, s. 3, and 4 Geo. II. cap. 21, s. 1, might be, but are not, read as enacting that the descendants through males of a natural-born British subject should themselves be in all cases natural-born British subjects.²

(C) *By the combined effect of descent and of place of residence during infancy.*³—The child of a naturalized British subject is not himself, in virtue of his descent, a natural-born British subject. Where, however, a father, or a mother (being a widow), obtains a certificate of naturalization in the United Kingdom, every child of such father or mother who, during infancy, becomes resident with such father or mother in the United Kingdom, is himself a naturalized British subject. It makes, apparently, no difference whether the child be born after or before the parent's naturalization. The two conditions requisite are, first, the naturalization of the parent, and, secondly, residence by the child during a portion of his infancy with the parent who has obtained naturalization in some part of the United Kingdom. Substantially the same principle applies in cases in which the father, or mother (being a widow), obtains a certificate of re-admission to British nationality⁴ under the Naturalization Act. The difference in this case is, that the residence which makes the child a British subject is residence, not necessarily in the United Kingdom, but in any part of the British dominions.⁵

(D) *By marriage.*—Marriage in no case affects the nationality of a man. With a woman it is otherwise.

The principle of English law laid down by the Naturalization Act, 1870, s. 10, is that "a married woman shall be deemed to be a subject of the state of which her husband is for the time being a subject."

The result of this principle is that a woman who is an alien acquires British nationality by marriage with a British subject.

Whether she retains British nationality, when on the death of her husband she becomes a widow, may perhaps be doubtful, and a similar question arises in case of her marriage being dissolved by a divorce. On the whole, the right answer to this inquiry probably is, that a woman who has by marriage become a British subject remains a British subject on the dissolution of her marriage. But the correctness of this reply must, until the matter is dealt with judicially, remain doubtful.

¹ Compare pp. 179, 180, *ante*.

² Note particularly the proviso to Rule 23, p. 177, *ante*, and comment thereon.

³ See Naturalization Act, 1870, s. 10, sub-s. (5), taken together with 58 & 59 Vict. cap. 43, s. 1, sub-s. (2), and Rule 34, p. 190, *ante*.

⁴ See Naturalization Act, 1870, s. 10, sub-s. (4), and Rule 36, p. 195, *ante*.

⁵ *Ibid.* Compare p. 745, *post*.

(E) *By naturalization under the Naturalization Act, 1870.* — An alien, if under no disability, *i. e.*, if neither an infant, a lunatic, an idiot, nor a married woman, can become a naturalized British subject by compliance with the conditions prescribed by the Naturalization Act, 1870.¹

II. LOSS OF BRITISH NATIONALITY (EXPATRIATION).

At common law a change of British allegiance or expatriation was impossible; a British subject might, indeed, become the subject of another state according to the law of that state. But the British Government and the British Courts did not, till the passing of the Naturalization Act, 1870, recognise such change of allegiance. A British subject, for example, who became a naturalized American citizen, though treated in the United States as an American citizen, was before 1870 held by British law to be still a British subject, and was liable to all the obligations of a British subject. Hence loss of British nationality or expatriation depends wholly upon Act of Parliament, *i. e.*, on the provisions of the Naturalization Act, 1870, as amended by subsequent enactments.

British nationality can be lost in the following four modes: —

- (A) By naturalization in a foreign state.²
- (B) By a declaration of alienage.³
- (C) By the combined effect of descent and place of residence during infancy.⁴
- (D) By marriage, in the case of a woman.⁵

(A) *By naturalization in a foreign state.* — A man or a woman who is not under any disability⁶ ceases to be a British subject, *i. e.*, becomes an alien, if, when in a foreign state, he or she becomes naturalized in such state.⁷

First. No one can thus cease to be a British subject who is either an infant, a lunatic, an idiot, or a married woman.⁸ The term "infant" means an infant according to English law. Hence an Englishman of 19 dwelling in a country where the age of majority is fixed at 18 could not (it is conceived) expatriate himself, in the eye of English law, by becoming naturalized in such country, even though the laws thereof should allow naturalization to any man over the age of 18.

Secondly. A British subject cannot, according to English law, cease to be a British subject, by becoming naturalized in a foreign state, unless he is in that state. Hence, to take an example suggested by history, the vote of a French assembly naturalizing a British subject

¹ See Naturalization Act, 1870, s. 7, and Rule 25, pp. 181, 182, *ante*, and compare as to disability, Rule 20, clause 6, p. 174, *ante*.

² Naturalization Act, 1870, s. 6; Rule 26, p. 184, *ante*.

³ Naturalization Act, 1870, s. 4; Rule 28, p. 186, *ante*.

⁴ Naturalization Act, 1870, s. 10, sub-s. 3; Rule 35, p. 193, *ante*.

⁵ Naturalization Act, 1870, s. 10; Rule 31, p. 189, *ante*.

⁶ As to disability, see p. 174, *ante*.

⁷ See Naturalization Act, 1870, s. 6 (1st para.), and Rule 26, p. 184, *ante*.

⁸ *I. e.*, is under a disability.

resident in England would not, according to English law, turn him into an alien, even though he were willing to accept French citizenship.

(B) *By declaration of alienage.*¹—Any person who is a natural-born British subject by reason of his having been born within the British dominions, *e. g.*, in London, and who is also at the time of his birth the subject of another state, *e. g.*, Italy, under the laws of that state (*e. g.*, Italian law) can, if under no disability,² make a declaration of alienage and thereupon cease to be a British subject.³ So also, subject to the same conditions as to absence of any disability, can any person who is born out of the British dominions of a father who is a British subject.⁴

The right to put off British nationality by a mere declaration of alienage is given in order to meet the case of persons who, though really foreigners, are under English law natural-born British subjects.⁵ The exercise of this right is subject to the following conditions:—

(1) It can be exercised only by a natural-born British subject.

(2) It cannot apparently be exercised by any one who is an infant according to English law, any more than by a lunatic, an idiot, or a married woman.

(3) The right may apparently be exercised at any time after the person exercising it has attained full age, *i. e.*, the age of 21.

(C) *By the combined effect of descent and place of residence during infancy.*⁶—When a child's father is a British subject, or a child's mother is a British subject and a widow, and such father or mother respectively become, under the Naturalization Act, 1870, an alien and naturalized in a foreign country, *e. g.*, Russia, then the child of such father or mother, if he, during infancy, has become resident in Russia, and has according to Russian law become naturalized in Russia, becomes a Russian subject and ceases to be a British subject. What is to be particularly noted is, that the *mere* fact of change of nationality on the part of a child's parents does not suffice to deprive him of the character of a British subject.

(D) *By marriage in the case of a woman.*⁷—A woman who is a British subject, on marriage with an alien ceases to be a British subject, and becomes a subject of the state of which her husband is, for the time being, a subject.

¹ Reference is purposely omitted to the exceptional case, in which, under a convention with a foreign state, aliens who have been naturalized as British subjects may divest themselves of British nationality. See Naturalization Act, 1870, s. 3, and Rule 27, p. 185, *ante*.

² See p. 174, *ante*.

³ Naturalization Act, 1870, s. 4, and Rule 28, p. 186, *ante*.

⁴ Naturalization Act, 1870, s. 4, and Rule 29, p. 186, *ante*.

⁵ See Rules 22 and 23, pp. 175, 177, *ante*.

⁶ See the Naturalization Act, 1870, s. 10, sub-s. 3, and Rule 35, p. 193, *ante*.

⁷ See Naturalization Act, 1870, 10, sub-s. 1, and Rule 31, p. 189, *ante*.

III. RESUMPTION OF BRITISH NATIONALITY.

British nationality can be resumed in the following three modes:—

- (A) By re-admission to British nationality under the Naturalization Act, 1870, in the case of a man or an unmarried woman of full age.
- (B) By marriage in the case of a woman.
- (C) By the combined effect of descent and place of residence during infancy.

(A) *By re-admission.*¹—A natural-born British subject may resume British nationality on obtaining a certificate of re-admission to British nationality. Such a certificate is given on substantially² the same terms, and subject to the same conditions, as a certificate of naturalization. It can therefore, apparently, be obtained only by an adult, and (in the case of a woman) only by an unmarried woman, including in that term a widow.

(B) *By marriage.*³—A woman who by marriage with an alien has become an alien resumes British nationality either on her husband becoming a British subject or, after her husband's death, by marriage with a British subject.

(C) *By the combined effect of descent and place of residence during infancy.*⁴—When a father, or a mother being a widow, has resumed British nationality, any child of such father or mother, who during infancy becomes resident in the British dominions with such father or mother, is "deemed to have resumed" the position of a British subject.

The residence of the child may be in any part of the British dominions, and need not be in the United Kingdom. The expression "resumed" used in the Naturalization Act, s. 10, causes some difficulty. What is the position of a child born out of the British dominions after his father has become an alien? Such child can scarcely "resume" a status which he never possessed. Perhaps emphasis must be laid on the word "deemed," and a child born out of the British dominions whilst the father is an alien is to be "deemed" to have resumed, *i. e.*, to be legally treated as though he had resumed, a status which, in fact, never belonged to him.

The principles of the common law, combined with the enactments relating to the acquisition and loss of British nationality, lead, apparently, to the result that an illegitimate child who is not a natural-born British subject cannot during infancy, in general, acquire or lose the status of a British subject; for the acquisition or the loss of British nationality demands that his relationship to his parents should receive a legal recognition denied to it by English law. A woman, however, though born illegitimate, may of course acquire or lose British nationality by marriage.

¹ See Naturalization Act, 1870, s. 8, and Rule 30, p. 187, *ante*.

² Note the Naturalization Act, 1870, s. 8 (Rule 30, pp. 187, 188, *ante*), para. 3, as to residence within a British possession, and compare s. 7 (Rule 25, p. 181, *ante*).

³ See Naturalization Act, 1870, s. 10, and Rule 31, p. 189, *ante*.

⁴ See Naturalization Act, 1870, s. 10, sub-s. 4, and Rule 36, p. 195, *ante*.

A child, further, who is duly legitimated under the law of his parents' domicile¹ is in England recognised as the child of his parents, and may, therefore, acquire or lose British nationality during infancy.

NOTE 6.

SERVICE OF WRIT OUT OF ENGLAND.

ORDER XI., RULES 1, 2.

(1) Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a Judge whenever —

- (a) The whole subject-matter of the action is land situate within the jurisdiction (with or without rents or profits); or
- (b) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action; or
- (c) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or
- (d) The action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction; or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England; or
- (e) The action is founded on any breach or alleged breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or
- (f) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or
- (g) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

(2) Where leave is asked from the Court or a Judge to serve a writ, under the last preceding Rule, in Scotland or in Ireland, if it shall appear to the Court or Judge that there may be a concurrent remedy in Scotland or Ireland (as the case may be), the Court or Judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant, or person sought to be served, and, particularly in cases of small demands, to the

¹ See Rule 134, p. 497, *ante*.

powers and jurisdiction, under the statutes establishing or regulating them, of the Sheriffs' Courts, or Small Debts Courts in Scotland, and of the Civil Bill Courts in Ireland, respectively.

ORDER XLVIII^a (19 JUNE, 1891), RULE 1.

Actions by and against Firms and Persons carrying on Business in Names other than their own.

Any two or more persons claiming or being liable as co-partners, and carrying on business within the jurisdiction, may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct.

NOTE 7.

LIST OF ADMIRALTY CLAIMS.¹

(i) *Any claim as to (1) the possession, (2) the ownership, (3) the earnings or employment, of any ship registered at any port in England.²*

This head includes three different kinds of claims, viz., a claim to the possession of a ship (e. g., where a ship is wrongfully detained by the master and an action is brought to dispossess him³); a claim involving a dispute as to ownership⁴ and claims by an owner or owners against the co-owners of a ship, under which class comes the proceeding called "an action of restraint," whereby the minority in interest of the owners of a British ship obtain security from the majority when about to send the ship on a voyage against the will of the minority.⁵

(ii) *Any claim to the ownership, possession, or employment of any foreign ship which the consul of the state to which the ship belongs consents, or which the parties to the action consent, to have tried.⁶*

¹ I. e., claims in respect of which an admiralty action is maintainable. See *Williams & Bruce, Adm. Prac.*, 2nd ed., chaps. i. to ix. inclusive. It may be well to observe that in this Note "British" means (1) as applied to a ship, a ship owned by British subjects within the Merchant Shipping Act, 1894 (57 & 58 Vict. cap. 60), s. 1; and (2) as applied to waters, territorial waters of the British dominions (see Territorial Waters Jurisdiction Act, 1878, 41 & 42 Vict. cap. 73), and "foreign" means "not British."

² See *Williams & Bruce*, Pt. I., chap. i., pp. 21-30; Admiralty Court Act, 1861 (24 Vict. cap. 10), s. 8; 3 & 4 Vict. cap. 65, s. 4. "England" in these claims includes Wales. See p. 68, ante.

³ *W & B.*, p. 23; *The New Draper*, 1802, 4 Rob. 287. *The See Reuter*, 1811, 1 Dod. 22; *The Kent*, 1862, Lushington, 495.

⁴ *W & B.*, p. 22; *The Empress*, 1856, Swab. 160; *The Glasgow*, 1856, Swab. 145.

⁵ *W. & B.*, p. 27; *The Talca*, 1880, 5 P. D. 169.

⁶ *W. & B.*, p. 24. They do not make a separate head of jurisdiction in respect to foreign owners, but group together all claims having reference to possession, restraint, and ownership.

"It is with the greatest reluctance that the Court adjudicates in suits of possession where foreigners alone are concerned; when it does proceed in such cases, it is only in order to prevent further inconvenience and loss by resort to the decisions of other Courts in other countries. Where the consent of the representative of the foreign state to which the vessel belongs is withheld, such a suit is seldom or never entertained unless it has been referred to the Court by the agreement of the parties. In a suit between foreigners, where the main question in the cause depends upon the municipal law of foreign states, and not upon any principle of the maritime law as administered in this country, the Court will decline to decree possession, for it will not be instrumental in depriving foreigners of rights to which they may be entitled by the law of their own country. But the Court will entertain a suit instituted by a British subject to recover possession of a ship which has come to this country in the possession of foreigners."¹

It is doubtful whether the Court has jurisdiction to entertain an action of restraint in the case of a foreign ship.²

(iii) *Any claim in respect of any mortgage³ where either (a) the ship is, or the proceeds thereof are, under arrest,⁴ or (b) the mortgage has been duly registered under the Merchant Shipping Act, 1894.⁵*

The Court of Admiralty had no original jurisdiction *in rem* over mortgages. It acquired, however, by statute, jurisdiction (which has passed to the High Court) in two cases: (1) Where the mortgage is unregistered, but the ship mortgaged is under the arrest of the Court, or (2) the proceeds thereof have been brought into the registry.⁶

The arrest, it should be noted, must be not only an actual arrest, but a rightful arrest, that is, it must be an arrest in a suit which the Court has jurisdiction to entertain.⁷

(iv) *Any claim to enforce a bottomry⁸ bond.*

"Bottomry is a contract by which, in consideration of money advanced for the necessities of a ship to enable it to proceed on a voyage, the keel or bottom of the ship, *pars pro toto*, is made liable for the repayment of the money in the event of the safe arrival of the ship at its destination. Not only the ship, but the freight and cargo, may be the subject of hypothecation. When the cargo alone is hypothecated, the term *respondentia* is applied to the contract. Respondentia bonds rest on the same general principles as bottomry

¹ *W. & B.*, p. 24.

² See *W. & B.*, p. 26, note (i), and *The Graff Arthur Bernstorff*, 1854, 2 Spinks, Ec. & Ad. 30.

³ *W. & B.*, Part I., chap. ii., pp. 31-41.

⁴ 3 & 4 Vict. cap. 65, s. 3; *W. & B.*, pp. 37, 38; *The Evangelistria*, 1876, 2 P. D. 241 (n).

⁵ Admy. Ct. Act, 1861 (24 & 25 Vict. cap. 10), s. 11; M. S. Act, 1894 (57 & 58 Vict. cap. 60), ss. 31-38, taken with Interpretation Act, 1889 (52 & 53 Vict. cap. 63), s. 38, sub-s. 1; *W. & B.*, pp. 38-40.

⁶ 3 & 4 Vict. cap. 65, s. 3.

⁷ *W. & B.*, p. 38, note (q), *The Evangelistria*, 1876, 2 P. D. 241 (n); *Taylor v. Carryl*, 1857, 20 Howard, 583, 599 (U. S.).

⁸ *W. & B.*, Pt. I., chap. iii., pp. 42-70.

"bonds on the ship,"¹ and for the present purpose may be included under bottomry. The Court, as representing the Court of Admiralty, has original jurisdiction to entertain an action *in rem* for any claim on a bottomry bond or on a respondentia bond.

(v) *Any claim for damage done or received by any British or foreign² ship, whether on the high seas or not.*³

"The Court of Admiralty always exercised undisputed jurisdiction "over torts committed by its own subjects on the high seas, but the "ancient statutes expressly prohibited it entertaining any cause of "action arising within the body of a country. So far, however, as "related to the jurisdiction of the Court in cases of damage, this "prohibition was almost entirely done away with prior to the transfer "of the jurisdiction of the Admiralty Court to the High Court of Justice."⁴ Since the Admiralty Court Act, 1861, the Court of Admiralty has entertained suits for collision between British ships in foreign inland waters; and the Court of Admiralty, and the High Court as representing it, has also entertained suits for collisions between foreign ships in foreign waters, and between an English and a foreign ship in foreign waters.⁵

The term "damage" in this claim includes personal injury.⁶ But the Court of Admiralty never possessed, and the High Court therefore has not jurisdiction to entertain, an action *in rem* for loss of life, under Lord Campbell's Act⁷ or otherwise.

(vi) *Any claim⁸ by the owner, consignee, or assignee, of a bill of lading carried, or to be carried,⁹ by any British or foreign ship¹⁰ into any port in England, for (1) damage done to goods by the negligence or misconduct of the owner, master, or crew, or (2) any breach of duty or breach of contract, in relation to the goods and connected with damage to them,¹¹ on the part of the master, owner, or crew.*¹²

¹ *W. & B.*, p. 42.

² See *The Mecca*, [1895] P. (C. A.) 96, 108, judgment of Lindley, L. J.

³ *W. & B.*, Pt. I., chap. iv., pp. 71-107; 3 & 4 Vict. cap. 65, s. 6; Admy. Ct. Act, 1861 (24 & 25 Vict. cap. 10), s. 7; M. S. Act, 1894 (57 & 58 Vict. cap. 60), s. 698, taken with Interpretation Act, 1889, s. 38, sub-s. 1; *The Clara Killam*, 1870, L. R. 3 A. & E. 161; *The Malvini*, 1863, Br. & L. 57; *The Griefswald*, 1859, Sw. 430; *The Sylph*, 1867, L. R. 2 A. & E. 24; *The Diana*, 1862, Lush. 539; *The Courier*, 1862, Lush. 541; *The Vera Cruz*, 1884, 10 App. Cas. 59; *The Robert Pow*, 1863, Br. & L. 99. See *The Theta*, [1894] P. 280, as to meaning of damage done "by" a ship.

⁴ *W. & B.*, p. 71.

⁵ *Ibid.*, p. 75; *The Courier*, 1862, Lush. 541; *The Diana*, 1862, Lush. 539; *The Halley*, 1868, L. R. 2 P. C. 193.

⁶ *The Sylph*, 1867, L. R. 2 A. & E. 24.

⁷ *The Vera Cruz*, 1884, 10 App. Cas. 59.

⁸ *W. & B.*, Pt. I., chap. v., pp. 108-113.

⁹ *The Danzig*, 1863, Br. & L. 102.

¹⁰ See *The Mecca*, [1895] P. (C. A.) 96, 108, judgment of Lindley, L. J.

¹¹ *W. & B.*, p. 110.

¹² 24 Vict. cap. 10, s. 6; *The Bahia*, 1863, Br. & L. 61; *The Patria*, 1871, L. R. 3 A. & E. 436; *The Pieve Superiore*, 1874, L. R. 5 P. C. 482; *The Norway*, 1864, Br. & L. 226; *The Dannebrog*, 1874, L. R. 4 A. & E. 386; *The Kasan*, 1863, Br. & L. 1; *The Tigress*, 1863, Br. & L. 38; *The St. Cloud*, 1863, Br. & L. 4; *The Princess Royal*, 1870, L. R. 3 A. & E. 41.

This claim is not maintainable if any owner, or part owner, of the ship is domiciled in England.¹

The jurisdiction of the Court depends upon the Admiralty Court Act, 1861 (24 Vict. cap. 10), s. 6.

In order that the claim may be maintainable, the following circumstances must exist:—

First. The claim must be made by the owner or consignee or assignee of the bill of lading of goods, and the term "assignee" is to be construed in accordance with 18 & 19 Vict. cap. 111, s. 1.²

Secondly. The goods in respect of which the action is brought must be goods carried or to be carried into England. The word "carried" is interpreted in a wide sense, and the Court will entertain a claim for short delivery of cargo.³ The word "carried" does not mean imported, but applies where goods are only incidentally brought into an English port.⁴

Thirdly. The breach of duty or contract must be in relation to the goods, and connected with damage to them.⁵ Thus an action cannot be maintained for a breach of duty committed by the master of the ship before the goods are put on board.

Fourthly. No owner or part owner of the ship must be domiciled⁶ in England. "Owner" means owner at the time when the damage is done.

(vii) *Any claim for salvage.*⁷

"Salvage is the reward payable for services rendered in saving "property lost at sea, or in saving any wreck, or in rescuing a ship or "boat, or her cargo or apparel, or the lives of the persons belonging "to her from loss or danger."⁸

For all details as to the nature of salvage, the reader is referred to books on admiralty law, and especially to *Williams & Bruce's Admiralty Practice*.⁹

For our present purpose the following points should be noted:—

First. The Court of Admiralty had originally no jurisdiction in salvage cases unless the services were performed on the high seas; but the jurisdiction of the Court has been gradually extended by various statutes, and now, by s. 565 of the Merchant Shipping Act, 1894, it is provided that, subject to certain provisions in that Act,¹⁰ the High

¹ See p. 749, note 12.

² See *W. & B.*, p. 108; *The St. Cloud*, 1863, Br. & L. 4.

³ *The Danzig*, 1863, Br. & L. 102.

⁴ *The Pieve Superiore*, 1874, L. R. 5 P. C. 482; *The Bahia*, 1863, Br. & L. 61.

⁵ *The Santa Anna*, 1863, 32 L. J. P. & M. 198.

⁶ As to nature of domicile, see Rules 1 to 11, pp. 79-129, and Rule 19, p. 154, *ante*.

⁷ *W. & B.*, Pt. I., chap. vi., pp. 114-174, and especially p. 139. "The Admiralty "Division is now enabled to entertain all actions of salvage, however small may be the "value of the property saved, or the amount claimed by the salvors." *W. & B.*, p. 139, citing *The Empress*, 1872, L. R. 3 A. & E. 502. See also, as to salvage for saving life, Admy. Ct. Act, 1861 (24 & 25 Vict. cap. 10), s. 9, and M. S. Act, 1894, s. 545, taken with Interpretation Act, 1889, s. 38, sub-s. 1; *The Willem III.* 1871, L. R. 3 A. & E. 487; *The Johannes*, 1860, Lush. 182; *W. & B.*, p. 116.

⁸ *W. & B.*, p. 114.

⁹ See *W. & B.*, chap. vi., p. 114 and following.

¹⁰ As to which see *W. & B.*, pp. 132-179.

Court has "jurisdiction to decide upon all claims whatsoever relating "to salvage, whether the services in respect of which salvage is "claimed were performed on the high seas or within the body of any "county, or partly on the high seas and partly within the body of any "county, and whether the wreck in respect of which salvage is claimed "is found on the sea or on the land, or partly on the sea and partly "on the land."¹

Secondly. The High Court "is now enabled to entertain all actions "of salvage, however small may be the value of the property saved "or the amount claimed by the salvors."²

Thirdly. The jurisdiction to entertain claims for salvage of life extends to the salvage of life from any British ship wheresoever the service may be performed, and from any foreign ship where the service has been rendered either wholly or in part in British waters, and may, under an agreement with the government of any foreign country, be extended by Order in Council to cases in which the services are rendered by the saving of life from a ship of such foreign country, whether within British waters or not.³

(viii) *Any claim for towage⁴ against any British⁵ or foreign ship.⁶*

(ix) *Any claim for necessities supplied to any foreign ship.⁷*

This claim, which rests upon 3 & 4 Vict. cap. 65, s. 6, applies only to *foreign* ships; but a claim against a ship which, at the time when the necessities were supplied, belonged to a foreigner, cannot be defeated by a transfer to a British owner before⁸ or after⁹ the commencement of the action. The words of the section give the Court jurisdiction to entertain claims for necessities supplied to a foreign ship in a British¹⁰ or colonial port,¹¹ but not for necessities supplied to a foreign ship in a foreign port,¹² unless, as may happen, the foreign port is upon the high seas;¹³ and "it has been laid down in general "terms that the Court will entertain claims for necessities only in "cases where the owners would be liable at common law."¹⁴

¹ M. S. Act, 1894, s. 565, re-enacting M. S. Act, 1854, s. 476. Note that *W. & B.*'s comments refer to the M. S. Act, 1854. See further, as to salvage for saving life, Admy. Ct. Act, 1861, s. 9; M. S. Act, 1894, s. 545; *W. & B.*, p. 116; *The Willem III.* 1871, L. R. 3 A. & E. 487; *The Johannes*, 1860, Lush. 182.

² *W. & B.*, p. 139.

³ M. S. Act, 1894, s. 545, and *W. & B.*, p. 136, note (a).

⁴ 3 & 4 Vict. cap. 65, s. 6; *W. & B.*, Part I., chap. viii.

⁵ As to meaning of "British" and "foreign," see note 1, p. 747, *ante*.

⁶ *W. & B.*, p. 175. Compare *The Mecca*, [1895] P. (C. A.) 95, 108, judgment of Lindley, L. J.

⁷ 3 & 4 Vict. cap. 65, s. 6; *W. & B.*, pp. 178-188; *The Henrich Björn*, 1886, 11 App. Cas. 270. See *The Mecca*, [1895] P. (C. A.) 95, overruling *The India*, 1863, 32 L. J. P. & M. 185, 186, judgment of Dr. Lushington, and note that cases which do not come within claim ix. may come within claim x.

⁸ *The Ella A. Clark*, 1863, Br. & L. 32, 37.

⁹ *The Princess Charlotte*, 1864, 33 L. J. P. & M. 188.

¹⁰ *The Henrich Björn*, 1886, 11 App. Cas. 270.

¹¹ *The Wataga*, 1856, Sw. 165.

¹² *The India*, 1863, 32 L. J. P. & M. 185.

¹³ *The Mecca*, [1895] P. (C. A.) 95, 108, judgment of Lindley, L. J.

¹⁴ *W. & B.*, p. 180.

(x) *Any claim for necessities supplied to any ship¹ elsewhere than in the port to which she belongs.²*

This claim is not maintainable if any owner, or part owner, of the ship is domiciled³ in England.⁴

This claim, the jurisdiction to entertain which depends upon the Admiralty Court Act, 1861, s. 5, applies whether the ship to which the necessities are supplied be British or foreign.⁵

The jurisdiction to maintain the claim is subject to two restrictions:—

(1) The necessities must not be supplied in the port to which the ship belongs.

(2) No owner of the ship must be domiciled in England or Wales.

(xi) *Any claim of the master or seamen for wages earned on board any British or foreign⁷ ship, and of the master for disbursements on account of such ship.⁸*

No distinction is drawn between claims by those serving on board British ships, and claims, either by foreigners or by British subjects, against foreign vessels which happen to be in the ports of this kingdom. At the same time the exercise of this jurisdiction is, as regards a foreign ship, discretionary with the Court; and if the consent of the representative of the government to which the vessel belongs is withheld upon reasonable cause being shown,⁹ the Court may decline to exercise its authority.¹⁰

(xii) *Any claim for building, equipping, or repairing any British or foreign¹¹ ship, where, at the commencement of the action, the ship is, or the proceeds thereof are, under arrest.¹²*

(xiii) *Any claim to enforce a judgment in rem obtained against a British or foreign ship in a foreign Court.¹³*

A judgment in rem was obtained against a ship in a foreign Court of Admiralty whereby the plaintiff in the foreign action was entitled to recover £25,000. The judgment not having been satisfied, the ship comes into an English port. A, the plaintiff in the foreign action, brings an action in rem against the ship in respect of the foreign judgment. The Court has jurisdiction to entertain the action.¹⁴

¹ I. e., any ship, whether British or foreign. See *The Mecca*, [1895] P. (C. A.) 95, overruling *The India*, 1863, 32 L. J. P. & M. 185.

² 24 & 25 Vict. cap. 10, s. 5; *W. & B.*, p. 187; *The Pacific*, 1864, Br. & L. 243; *Ex parte Michael*, 1872, L. R. 7 Q. B. 658; *The Two Ellens*, 1872, L. R. 4 P. C. 161; *The Henrich Björn*, 1886, 11 App. Cas. 270; *The Ella A. Clark*, 1863, Br. & L. 32.

³ As to nature of domicile, see Rules 1 to 11, pp. 79–129, ante.

⁴ *The Bahia*, 1863, Br. & L. 61.

⁵ *The Mecca*, [1895] P. (C. A.) 95.

⁶ *Ibid.*

⁷ *W. & B.*, p. 200. See *The Mecca*, [1895] P. (C. A.) 95.

⁸ Admy. Ct. Act, 1861, s. 10; *W. & B.*, Pt. I., chap. ix., pp. 180–209.

⁹ *The Leon XIII.* 1883, 8 P. D. (C. A.) 121.

¹⁰ *The Nina*, 1867, L. R. 2 P. C. 38. See *W. & B.*, p. 200.

¹¹ *The Mecca*, [1895] P. (C. A.) 95, 108, judgment of Lindley, L. J.

¹² *W. & B.*, pp. 187, 188; 24 Vict. cap. 10, s. 4; *The Aneroid*, 1877, 2 P. D. 189.

¹³ *The City of Mecca*, 1879, 5 P. D. 28; 1881, 6 P. D. (C. A.) 106; *The Bold Buccleugh*, 1851, 7 Moore P. C. 267; *W. & B.*, p. 107.

¹⁴ *The City of Mecca*, 1881, 6 P. D. (C. A.) 106. The action failed in the particulars

This claim (it is submitted) may be put in a more general form, and it may be laid down that the Court has jurisdiction to entertain an action *in rem* for the enforcement of any maritime lien if the case is one in which, according to English law, a maritime lien exists.

NOTE 8.

THEORIES OF DIVORCE.

The doctrine maintained by the Courts of any country with regard to jurisdiction in matters of divorce and points connected therewith ultimately depends upon the view entertained by such Courts with regard to the nature of divorce. On this matter three different theories, resting at bottom on the different views which may be taken of marriage, have been maintained at different times and in different countries. These theories may for convenience be termed the "contractual theory," the "penal theory," and the "status theory" of divorce.

(A) *The Contractual Theory.*—Marriage may be regarded mainly as a contract between the parties thereto. On this view of marriage, divorce is naturally regarded as the rescission of the marriage contract, on the terms or conditions (if any) for its determination agreed upon between the parties at the time of the marriage; as, for example, that it might be put an end to on the ground of incompatibility of temper, or of the husband's desertion of the wife. Even on what may be termed the extreme contractual theory, marriage has never in modern times been put on exactly the same footing as other agreements. The conditions of the contract, as to its rescission and otherwise, have never, in Christian countries at least, been held to be subject to variation at the will of the parties, but have always been treated as determined by the law of the country under the law whereof the marriage is made. It has further been almost universally held that a marriage can be dissolved only by public authority. Still, on the contractual view, a divorce may fairly be described as the rescission of a contract, and the right to divorce may be regarded as the right of the party aggrieved to have the marriage contract rescinded on the conditions, if any, agreed upon between the parties with reference to its rescission.

Results of Theory.—From this theory two consequences naturally ensue. First, if the parties marry under a law which, like that of England before 1858, or of modern Italy, does not recognise divorce, neither of them can have under any circumstances the right to petition the tribunals of any country whatever for a divorce. For a person who has married, for instance, under the law of Italy, has entered into an agreement, one of the terms of which is that it shall never be rescinded. He cannot, therefore, have, in virtue of this contract, a ground for

case because the foreign judgment was not a judgment *in rem*, but the principle was apparently admitted. The jurisdiction does not depend upon statute.

applying to the Courts of any country whatever for its rescission.¹ Secondly, jurisdiction in matters of divorce belongs, on this view, exclusively to the tribunals of the country under the law of which the marriage was celebrated. The latter conclusion is no doubt not an inevitable, but is certainly a natural, result of the general theory.

Defects of Theory. — The contractual theory, though often maintained, has never been found satisfactory.² The parties to a marriage do not, in fact, contemplate its rescission, but intend to enter into an agreement for life. The intervention, again, of the state aims rather at the punishment of an offender or the relief of a person injured by the misconduct of another, than at the giving effect to a contract.

(B) *Penal Theory.* — Marriage may be regarded as a contract imposing on each of the parties duties in the fulfilment of which the state is so much concerned that the breach thereof exposes the offender to legal penalties. On this view of marriage a divorce is naturally regarded as the penalty inflicted by the state on offences against the marriage relation.

Results of Theory. — The "penal theory" is inconsistent with the view that the right to divorce depends on the terms imposed by the law under which the parties married. The liability to divorce depends, on the penal theory, like the liability to other criminal punishments, on the law of the place where the criminal is residing, or where the offence is committed. Hence, jurisdiction in matters of divorce is, on this view, given by the temporary residence of married persons within a given country, especially if the offence against the marriage relation, *e. g.*, adultery, is committed within the limits of such country. The penal theory of divorce has not, on the whole, been favoured by English tribunals,³ but has certainly influenced Scotch Courts, and affords the theoretical justification for the freedom with which they have in practice exercised jurisdiction in matters of divorce.⁴

Defects of Theory. — This theory has at least two defects. Divorce, in the first place, is not of necessity a penal proceeding. It may, as in countries where it is granted because of the lunacy of one of the parties to the marriage, not be the punishment for any offence, and is, in any case, far more naturally looked upon as a measure of relief to the husband or wife, or to both, than as a punishment to either. In the second place, if divorce be the punishment for a crime, there is a difficulty in seeing why it should have an extra-territorial effect.

(C) *Status Theory.* — Marriage may be regarded as a contract

¹ *Tovey v. Lindsay*, 1813, 1 Dow. 117, 131, 140.

² *Warrender v. Warrender*, 1835, 2 Cl. & F. 488; *Mordaunt v. Mordaunt*, 1870, L. R. 2 P. & D. 109, 126, judgment of Lord Penzance.

³ *Mordaunt v. Moncrieffe*, 1874, L. R. 2 Sc. Ap. 374. Thus a committee of a lunatic may bring a suit for the dissolution of the lunatic's marriage. *Baker v. Baker*, 1880, 5 P. D. 142. "Proceedings of this kind [*i. e.*, for divorce] are not criminal, and if not "criminal then they must be civil, for there cannot be quasi civil or quasi criminal "cases." *Branford v. Branford*, 1878, 4 P. D. 72, 73, judgment of Hannen, Pres.

⁴ For Scotch views of divorce jurisdiction, see *Mackay, Court of Session*, ii., pp. 262-268.

which creates or constitutes a special status, viz., the status or condition of husband and wife. On this view of marriage a divorce is the act by which a state through a public authority dissolves or puts an end to the marriage status.

Results of Theory. — First, the claim to divorce has, on this view, no connection with the terms of the marriage contract, for a divorce is not the rescission of an agreement, but the extinction of a status, the continuance of which is in the judgment of the state inexpedient, whether on grounds of justice or of policy. Hence, secondly, the fact that the parties were married under a law which did not recognise divorce affords no reason why the Courts of a state, the law of which does recognise divorce, should not dissolve their marriage. Thirdly, jurisdiction to dissolve a marriage naturally belongs on this view exclusively to the tribunals of the country where the parties are domiciled. For this is, according to the doctrine generally prevalent, the country to which the parties belong, and by the law of which their status is determined.¹ Fourthly, a judgment pronounced by such tribunals has effect everywhere.

It should be noticed that the Courts of countries, whose law makes allegiance and not domicile determine a person's status, would naturally hold that the right to divorce depends on the law of the country of which the parties to a marriage are citizens, and that jurisdiction in matters of divorce belongs exclusively to the Courts of such country.

NOTE 9.

EFFECT OF FOREIGN DIVORCE ON ENGLISH MARRIAGE.

(A) *State of the Law before 1858.* — Till the year 1858, when the Matrimonial Causes Act, 1857, came into operation, our Courts inclined towards the contractual theory of divorce,² and on the whole held that the right to divorce depended on the terms of the marriage contract.³ From this theory, combined with the fact that no means then existed by which a marriage could be dissolved in due course of law by the English Courts,⁴ arose two doctrines which, on the whole, received the approval of English tribunals.

The first doctrine was that no foreign Court could, under any circumstances, pronounce a divorce which should be held valid in England of the parties to an English marriage. This view, which was a legitimate inference from the premises on which it was based, may be termed the received doctrine. No decision can be cited which shows that our Courts ever, prior to 1858, recognised the right of foreign tribunals to dissolve an English marriage, and several decisions exist which can hardly with

¹ See judgment of Brett, L. J., in *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1, 9.

² See p. 753, *ante*.

³ *Tovey v. Lindsay*, 1813, 1 Dow. 117, 131, 140.

⁴ *Wilkinson v. Gibson*, 1867, L. R. 1 Eq. 162, 168.

fairness be interpreted as consistent with the opinion that an English marriage was, under any circumstances, dissoluble.¹ But, though the dogma that an English marriage was indissoluble was the received opinion of the Courts, it was one which never obtained decisive judicial sanction. The cases which could be cited in its support do not go further than showing that our Courts would not recognise a divorce when the parties to it were not domiciled in the country where the divorce was obtained, and it has even been maintained that the position, that a foreign tribunal can dissolve an English marriage when the parties thereto are domiciled within its jurisdiction, is consistent with all English decisions, though it may not be consistent with the resolution of the judges in *Lolley's Case*.² Though, in short, before 1858, the contractual theory was, on the whole, predominant, yet it never received full legal recognition, while its effects were counter-acted by the partial influence of what we have termed the status theory of divorce.³

The second doctrine resulting from the contractual theory was that every marriage celebrated in England was an English marriage, and, therefore, indissoluble by the decree of a foreign tribunal. Hence it was on one occasion decided that the marriage in England of a Dane domiciled in Denmark could not, as far as effects in England went, be dissolved by a Danish divorce. The conclusion, however, that every marriage celebrated in England was an English marriage, and, therefore, indissoluble, was erroneous, even on the contractual theory of divorce. For even if the right to divorce depends on the terms of the marriage contract, these terms are fixed by the law of the country subject to which the marriage is made, which, no doubt, is in general the law of the country where the marriage is celebrated, but may be the law of the country where the husband is domiciled. This was perceived long before the passing of the Matrimonial Causes Act, 1857, and the better, though not the predominant opinion became, that the marriage in England between parties of whom the husband was domiciled, for example, in Scotland, was not an English but a Scotch marriage, and, therefore, not affected by the rule making English marriages indissoluble.⁴ The state of the law, therefore, prior to 1858, may be thus summed up.

First. An English marriage was generally held to be indissoluble, though some lawyers inclined to the opinion that when the parties to such a marriage were domiciled in a foreign country they might obtain a divorce which would be held valid in England.

Secondly. The Courts often identified a marriage celebrated in England with an English marriage, but the better opinion was that the character of a marriage depended on the domicile of the husband at the time of its celebration.

¹ *Lolley's Case*, 1812, 2 Cl. & F. 567; *Macarthy v. De Caix*, 1831, 2 Cl. & F. 568.

² *Shaw v. Gould*, 1868, L. R. 3 H. L. 55, 85.

³ *Warrender v. Warrender*, 1835, 2 Cl. & F. 488; *Conway v. Beasley*, 1831, 3 Hagg. Ecc. 639.

⁴ *Warrender v. Warrender*, 1835, 2 Cl. & F. 488. See now, *Harvey v. Farnie*, 1882, 8 App. Cas. 43.

(B) *State of the Law since 1858.*—Our Courts have, since 1858, surrendered the theory that an English marriage cannot be dissolved by a foreign divorce, and admit that where the parties to such a marriage are *bonâ fide* domiciled in a foreign country, the tribunals of that country have jurisdiction to pronounce a divorce which will be held valid in England. This view of the present state of the law has been put forward throughout this treatise,¹ and can be maintained with confidence on the following grounds:—

First. The Matrimonial Causes Act, 1857, strikes at the root of the theory that no English marriage can be dissolved by a foreign Court. For the Act, by providing regular means for divorce, disposes of the contention that an English marriage is a contract entered into on the terms that it shall never be rescinded; and further, being applicable to marriages made before the time when the Act passed, amounts to something like a legislative declaration that the right to divorce does not depend upon the terms of the marriage contract.

Secondly. Even independently of the effect of the Act, English judges have, in modern times, shown an inclination to reject the contractual theory of divorce,² and, at the same time, have, on one occasion, at least, distinctly repudiated what we have termed the penal theory.³

Thirdly. Not only may strong judicial dicta be cited in favour of the view that questions of divorce are questions of status and therefore ought to be decided wholly by the Courts of the country where the parties are domiciled,⁴ but at least one case virtually decides that an English marriage is, where the parties have become domiciled in a foreign country, dissoluble by the Courts of that country.⁵ *H* and *W*, an Irishman and Irishwoman, domiciled in Ireland, were there married; they afterwards became domiciled in a foreign country, and were there duly divorced. The divorce was held valid in England.⁶ The marriage, it is true, was an "Irish," not an English marriage, but this fact increases the effect of the decision. Every argument which might show that an English marriage is indissoluble is applicable to an Irish marriage, and one argument may still be adduced in favour of the indissolubility of an Irish which does not apply to an English marriage. Divorce *a vinculo* is not part of the law of Ireland.

A foreign divorce, therefore, if pronounced by a divorce Court of the country where the parties to an English marriage are domiciled, will, under the present state of the law, dissolve an English marriage and be held valid in England.

¹ See Rule 83, p. 387, *ante*.

² *Mordaunt v. Mordaunt*, 1870, L. R. 2 P. & D. 109, 127; *Shaw v. Gould*, 1868, L. R. 3 H. L. 55, 90, 91.

³ *Mordaunt v. Moncrieffe*, 1874, L. R. 2 Sc. Ap. 374.

⁴ *Wilson v. Wilson*, 1872, L. R. 2 P. & D. 435, 442; *Niboyet v. Niboyet*, 1878, 4 P. D. (C. A.) 1, 19; *Shaw v. Attorney-General*, 1870, L. R. 2 P. & D. 156, 161, 162; *Shaw v. Gould*, 1868, L. R. 3 H. L. 55, 85.

⁵ *Scott v. Attorney-General*, 1886, 11 P. D. 128.

⁶ *Ibid.*

(C) *Jurisdiction of Scotch Courts to dissolve an English marriage?*
 — The Scotch Courts adopting in the main the “penal” theory of divorce¹ have never admitted that the fact of a marriage being celebrated in England, or of its being in strictness an English marriage, deprives them of jurisdiction to grant a divorce.²

They have further maintained that jurisdiction is given by:—

- (1) the commission in Scotland of a divorce offence (*locus delicti*) and the personal citation of the defendant;³ or
- (2) the residence of the parties (*i. e.*, in effect of the husband) in Scotland for a period of forty days;⁴ or
- (3) the *bond fide* domicil of the parties in Scotland.

The English Courts have never conceded the validity of all the claims put forward by Scotch tribunals. They showed at one time, as already pointed out,⁵ a disposition to maintain that every marriage celebrated in England was an English marriage, and that a Scotch divorce could not dissolve an English marriage as regards its effect in England,⁶ and have since no less than before the passing of the Matrimonial Causes Act, 1857,⁷ strenuously maintained that no decree of a Scotch Court can divorce the parties to an English marriage, unless they are domiciled in Scotland at the time of the divorce. This difference of view as to jurisdiction in the matter of divorce has led to some practical inconvenience and to much debate. The result, however, of a controversy which has now lasted for years is not altogether unsatisfactory, and may be thus summed up:—

The Scotch Courts, as represented at any rate by the House of Lords, would appear to have surrendered the claim to dissolve the marriage of persons not domiciled in Scotland, or at least to look with great doubt on the doctrine that either the *locus delicti* or residence for forty days gives jurisdiction in matters of divorce.⁸ It is, however, perfectly clear that the Scotch Courts, even if they surrender other grounds of jurisdiction, claim jurisdiction to dissolve the marriage of any persons domiciled in Scotland.⁹

As the English Courts have now conceded that an English marriage may be dissolved by the tribunals of any country where the parties are domiciled at the time of their divorce,¹⁰ it follows that a Scotch divorce will in general be held valid in England if the parties to the marriage are at the time of the divorce domiciled in Scotland, and not otherwise.

¹ See p. 754, *ante*; *Utterton v. Tewsh*, 1811, Ferg. Div. Cases, 23.

² *Fraser, Treatise on Husband and Wife*, 2nd ed., pp. 1276-1294; *Warrender v. Warrender*, 1835, 2 Cl. & F. 488.

³ 2 *Fraser*, 2nd ed., 1288, 1289.

⁴ See *Ringer v. Churchill*, 1840, 2 D. 302; *Jack v. Jack*, 1862, 24 D. 467; 2 *Fraser*, pp. 1276-1283.

⁵ P. 754, *ante*.

⁶ *Lolley's Case*, 1812, 2 Cl. & F. 567.

⁷ *Shaw v. Gould*, 1868, L. R. 3 H. L. 55.

⁸ *Pitt v. Pitt*, 1864, 4 Maoq. 627; *Jack v. Jack*, 1862, 24 D. 467; *Ringer v. Churchill*, 1840, 2 D. 302.

⁹ *Warrender v. Warrender*, 1835, 2 Cl. & F. 488.

¹⁰ See Rule 83, p. 387, *ante*.

There is reason, therefore, to hope that the controversy between the English and the Scotch Courts may now be closed by the mutual admission that in matters of divorce domicile is the true criterion of jurisdiction.

NOTE 10.

THE THEORETICAL BASIS OF THE RULES AS TO THE EXTRA-TERRITORIAL EFFECT OF A DISCHARGE IN BANKRUPTCY.

The theoretical basis on which rest the Rules¹ as to the extra-territorial effect of a discharge in bankruptcy is hard to discover.

They are not grounded on the jurisdiction of the Court to adjudge a debtor bankrupt, for they are in no way affected by his domicile.² They do not rest wholly upon the territorial authority of the sovereign by whom a bankruptcy law is enacted, for if they did, a discharge in bankruptcy would logically in no case have any extra-territorial operation. They do not, lastly, depend wholly upon the proper law of the contract under which the liability from which a bankrupt is discharged has arisen,³ for no reference to the proper law of a contract can explain how it is that a discharge under an Act of the Imperial Parliament is in England a discharge from a debt owing by a Frenchman to another Frenchman which is both contracted and payable in France, nor generally how it is that a discharge in bankruptcy under the law of a given country is in that country treated as a discharge from any debt wherever incurred or wherever payable.⁴

The explanation, if not the logical justification, of the effect given by our Courts to a discharge in bankruptcy is to be found in the influence exerted on the minds of English judges by two different, though not inconsistent, views of the same legal transaction.

First. A discharge may be looked upon as a command given by the sovereign of a country to the Courts thereof that they shall treat a bankrupt *debtor* as freed from liability for his debts. If the matter be regarded from this point of view, the operation of a discharge depends upon the territorial limits assignable to the authority of the legislature or sovereign by whose command the discharge is given. Hence a bankrupt is freed from liability throughout the whole of a sovereign's territory from every debt wherever contracted or payable. This is the explanation of Rules 111 and 114,⁵ and in general terms of the effect of a discharge within the country under the law of which it is obtained on debts contracted in other countries.⁶

Secondly. A discharge may, from another point of view, be looked

¹ See Rules 111 to 114, pp. 448-454, *ante*.

² *Gibbs v. Société Industrielle*, 1890, 25 Q. B. D. (C. A.) 399.

³ The influence of the "proper law" (see Rule 143, p. 540, *ante*) is treated as the decisive consideration in *Gibbs v. Société Industrielle*, and other cases..

⁴ See Rule 111, p. 448, *ante*.

⁵ See pp. 448, 454, *ante*.

⁶ See *Ellis v. McHenry*, 1871, L. R. 6 C. P. 228.

upon as a mode in which a debtor is freed from his liability in accordance with the contract between the debtor and his creditor, or rather as a mode of terminating liability under a contract which was contemplated as possible by the parties at the time they entered into their agreement, or, in other words, at the time when the contract was made.¹

On this latter view of the matter, the extra-territorial operation of a discharge in bankruptcy must depend on the result of the inquiry whether the law under which the debtor is made bankrupt is also the proper law of the contract.² If an affirmative answer be given, the discharge ought to be valid everywhere; if a negative answer be given, the discharge ought to have, at any rate, no extra-territorial operation. And this, it is conceived, is the predominant doctrine of English Courts as to any discharge which does not take place under an Act of the Imperial Parliament, and affords the explanation of Rules 112 and 113.³ They lead, when stated in a summary form, to this result: viz., that a discharge under any bankruptcy taking place outside the United Kingdom is a valid discharge everywhere from any debt which is contracted [or probably which is payable] in the country of the bankruptcy,⁴ and is not a discharge from any debt which is neither incurred nor payable in such country;⁵ which comes round, in other words, to the statement that the validity of a discharge depends upon its being a release from the debt under the proper law of the contract.

There is, it is true, as already pointed out, some question whether a discharge under the law of a country where a debt is payable, but is not contracted, has an extra-territorial effect.⁶ But this difficulty, such as it is, arises from the doubt which runs through the English law of contract whether, when the law of a country where a contract is made (*lex loci contractus*) and the law of the country where it is to be performed (*lex loci solutionis*) are different, the *lex loci solutionis* is or is not the proper law of the contract; and it is very characteristic of English law that the *lex loci contractus* should, in reference to the effect of a discharge, be constantly assumed to be the proper law of the contract.

But the truth is that, in maintaining the extra-territorial effect of a discharge in accordance with the *lex loci contractus*, English lawyers have probably been influenced by both the views which may be taken of the nature of a discharge. If the discharge be looked upon as the command of a sovereign, it may well be held that debts incurred within his territory are at once extinguished by his order, or, in other words, that (to take a particular case) an English law can extinguish English debts. If, on the other hand, a discharge be regarded in the light of a release from liability in accordance with the terms of a

¹ See *Gibbs v. Société Industrielle*, 1890, 25 Q. B. D. (C. A.) 399, 406, 406, passage from judgment of *Esher*, M. R., cited pp. 452, 453, *ante*.

² As to meaning of "proper law of contract," see Rule 143, p. 540, *ante*.

³ See pp. 449, 451, *ante*.

⁴ See Rule 112, p. 449, *ante*.

⁵ See Rule 113, p. 451, *ante*.

⁶ See pp. 449, 450, *ante*.

a contract, then the *lex loci contractus* being, according to the doctrine of English law, presumably, at any rate, the proper law of a contract, it follows that a discharge under the law of the country where a debt is incurred is a discharge in accordance with its proper law, and therefore extra-territorially valid.

However this may be, the extra-territorial effect of a discharge in bankruptcy can be explained, and can, it is submitted, be explained only by keeping in view the two-fold character of a discharge as the command of a sovereign and a mode of release under the terms of a contract.

NOTE 11.

LEGITIMATION.

Question.—Do English Courts ever in strictness admit the legitimacy of a person born out of lawful wedlock?

To this question two different answers have been given:—

First answer. English Courts do not in strictness admit the legitimacy of any person born out of lawful wedlock.

This answer was at one time, at any rate, plausible. The Scotch cases, such as *Udny v. Udny*,¹ are, it was argued, decisions as to Scotch law, and only determined that the son of a man domiciled in Scotland can, under Scotch law, be legitimated by the subsequent marriage of his parents. Nor do most of the cases regulating succession to movables go further than deciding that such succession is governed wholly by the law of the country where the deceased intestate or testator dies domiciled. An illegitimate child may, on this principle, claim movable property in England, if the law of his father's domicile entitles him to share in the succession.² The fact, therefore, that a legitimated person may succeed to his father's movable property under the law of his father's domicile no more proves that our Courts recognise a legitimated person as legitimate, than the fact that an adopted child may, under the law of the deceased's domicile, succeed to movable property in England as an adopted son proves that English law recognises relationship by adoption.

Second answer. Our Courts hold that the question of a child's legitimacy is to be determined by the law of the father's domicile at the time of the child's birth, taken together with the law of the father's domicile at the time of the subsequent marriage of the child's parents, and, when a person is legitimated under these two laws, fully admit his legitimacy.

This, it may now be laid down with confidence, is the right reply to a question which not many years ago did not admit of a perfectly certain answer.

D, an unmarried woman, died intestate and domiciled in England. *A*, the child of *D*'s brother, was born before her father's marriage,

¹ 1869, L. R. 1 Sc. App. 441.

² *Dogliani v. Crispin*, 1866, L. R. 1 H. L. 301.

but whilst he was domiciled in Holland, and was, whilst *A*'s parents were still domiciled in Holland, legitimated there by their marriage. It was held by the Court of Appeal that *A* was entitled, as next of kin, to succeed to the movable property of *D*, *A*'s aunt, who, as already mentioned, died intestate and domiciled in England, or in other words, *A* was recognised in England as the legitimate child of her father, and as such entitled to succeed to the movable property of *A*'s aunt under the Statute of Distributions.¹

This case is decisive, for, since the intestate was an Englishwoman, dying domiciled in England, it is clear that her movable property could devolve only upon persons who were her legitimate next of kin under the Statute of Distributions, and therefore the decision in favour of *A*'s claim was in the strictest sense a decision in favour of *A*'s legitimacy.² The principle involved in this decision has, since it was given, been carried a step further. Where real estate in England was devised by a testator to the children of *D*, who was domiciled in a foreign country, it was held that *A*, who was born whilst his father, *D*, was domiciled in such foreign country, and was legitimated by the subsequent marriage in such country of *D* with *A*'s mother, was a legitimate child of *D*, and entitled to share in the English realty devised to *D*'s children.³

To the doctrine that a person legitimated under the law of his father's domicile is to be treated as strictly legitimate in England objection may be raised.

The doctrine is, it may be urged, inconsistent with the rule, established by *Birtwhistle v. Vardill*,⁴ that a person born out of lawful wedlock cannot succeed as heir to real estate in England. This objection is untenable. *Birtwhistle v. Vardill* decides not that a person born out of lawful wedlock cannot, under any circumstances, be treated in England as legitimate, but, what is quite a different point, that he cannot, though legitimated, be heir to English realty.⁵

NOTE 12.

WHAT IS THE LAW DETERMINING THE ESSENTIAL VALIDITY OF A CONTRACT?⁶

(A) *Nature of Inquiry*. — A contract is under the law of any country essentially valid when it is a contract of a kind to which the law will give effect; a contract lacks essential validity under the law of a given country, *e. g.*, England, when it is one to which, on account of its nature, the law will not give effect. Thus under the law of

¹ *In re Goodman's Trusts*, 1881, 17 Ch. D. (C. A.) 266, which perhaps may be treated as overruling *Boyes v. Bedale*, 1863, 1 H. & M. 798; 33 L. J. Ch. 263.

² See especially, judgment of *James*, L. J., 17 Ch. D. pp. 296-301.

³ *In re Grey's Trusts*, [1892] 3 Ch. 88.

⁴ 1835, 2 Cl. & F. 571; 1840, 7 Cl. & F. 895.

⁵ See Rule 134, pp. 497, 498, *ante*.

⁶ *Westlake*, pp. 258, 259; *Foote*, pp. 364-375; *Nelson*, pp. 261-266.

England a contract to commit a crime, a contract partaking of champerty, a wagering contract, a contract void for want of consideration, are all materially or essentially invalid. They are contracts which the law treats as void or voidable, and therefore refuses to give them effect, and this because of the nature of the contract. It should be noted, however, that a contract may be essentially invalid either because it is illegal, *i. e.*, is an agreement which the law in strictness forbids, or because it is an agreement which, though not in any sense forbidden by law, is one to which the law for one reason or another will not give effect; such an agreement (*e. g.*, under the law of England a wagering contract) is not in any strict sense illegal. All contracts which are materially invalid have this feature in common; they are all contracts which, under the law of a given country, are, on account of something in the nature of the agreement, invalid, *i. e.*, void or voidable. Now assume, as we may do, that under the law of every country some contracts are materially invalid, and that the laws of different countries differ more or less as to the contracts which they treat as invalid, and we are at once met by the following question: Whenever a contract contains any foreign element,¹ *e. g.*, is made in England, and is to be performed in France or *vice versa*, and is materially valid under the law of the one country, but materially invalid under the law of the other, by the law of which country is an English Court to determine its material validity? This is, in substance, the inquiry before us.

(B) *Answer to Inquiry.* — The answer to our inquiry is supplied by two different and competing theories; they often lead to the same practical result, but they must be carefully distinguished.

First theory. — *The essential validity of a contract is to be tested in the main by the law of the place of performance (lex loci solutionis), though it may occasionally depend also upon the law of the place where the contract is made (lex loci celebrationis); in any case it does not depend upon the intention of the parties.*

This is the position maintained with great ability by Mr. Foote, who sums up his doctrine in these words: —

"The legality," he writes, "of a contract, depends generally upon the law of the place of intended performance.

"An act which is illegal by the law of the place where it is intended to be done cannot be validly contracted for in any place.

"But the legality of the making of the agreement, *i. e.*, the giving a particular consideration for a particular promise — seems to depend upon the *lex loci actus*."²

The point to be noted is that Mr. Foote's theory makes the legality of a contract wholly independent of the intention of the parties, and therefore independent of the "proper law of the contract," which is nothing else than the law by which the parties intend that their contract shall be governed. "Wide," he writes, "as the operation necessarily is which is given to the *intention* of the parties to a contract, it is plain that it can have no effect upon the question of the

¹ See Intro., pp. 1, 2, *ante*.

² Foote, 2nd ed. p. 375.

"legality or illegality of the thing contracted for. No law can permit itself to be evaded, nor can it, consistently with the principles of international jurisprudence, sanction the evasion of a foreign law. Thus, if the thing contracted to be done is illegal by the law of the place of the intended performance, the contract should be held void, wherever it was actually entered into, by all Courts alike."¹

This doctrine has great plausibility, and within certain limits is sound.

Parties who contract under a given law cannot at their will make a contract legal and valid, which that law declares to be illegal and invalid. It is also plain that in many cases a contract which is unlawful by the law of the place where it is to be performed should be held unlawful elsewhere, to which it may further be added that as the law of the place of performance is often the proper law of a contract, Mr. Foote's conclusions in practice constantly coincide with the views of those who conceive that the essential validity of a contract depends to a great extent upon its proper law. But though there seems at first sight good ground for acquiescing in the theory that the validity of a contract is governed by the *lex loci solutionis*, this theory must be, at any rate in the eyes of a writer who is bound by English decisions, open to more than one objection.

First objection. — The interpretation of a contract and the obligations undertaken by the parties, or, at any rate, intended to be undertaken by them, must admittedly be governed by the law to which they intended to submit themselves, but it is extremely difficult on the one hand to separate from one another questions as to the validity and questions as to the effect of the terms of a contract, and it is impossible, on the other hand, to maintain that the proper law of a contract is always fixed by the law of the place of performance. When, for example, it is fixed, as in agreements for carriage by sea, by the law of the flag, it cannot be maintained that the proper law of the contract is the *lex loci solutionis*.

Second objection. — The theory is, it is submitted, inconsistent with recent decisions of English Courts.²

Third objection. — If, however, the decisions referred to can (as is possibly the case) be so explained as to be consistent with the decisive influence attributed to the *lex loci solutionis*, the theory that the law of the place of performance in itself governs the validity of a contract is, nevertheless, opposed to the whole course of thought pursued by English judges when determining the question which is now under consideration. They first try to decide what is the country by

¹ Foote, p. 364. He also shows, though this is a point with which we need not for our present purpose greatly concern ourselves, that an agreement, the making of which is positively prohibited by the law of the country where it is made, should and probably will be held void in other countries. Foote, pp. 369, 370.

² *Lloyd v. Guibert*, 1865, L. R. 1 Q. B. 115; *P. & O. Co. v. Shand*, 1865, 3 Moore P. C. N. s. 272; *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589; *In re Missouri Steamship Co.* 1889, 42 Ch. D. (C. A.) 321. Compare *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

the law of which a contract is substantially governed, and ask themselves whether a given agreement is an "English contract" or a foreign, *e. g.*, a "French contract." In determining this point they take into account both the terms of the contract itself and all the circumstances of the transaction, such as the character of the parties, the place where the contract is made, the place where it is to be performed, and so forth. When, from this general survey of the facts, they have made up their minds as to the country to which the contract belongs, they then hold that not only the effect, but also the validity, of the contract, is governed by the law of such country; if the contract is an English contract they determine its validity, no less than its interpretation, by reference to English law; if the contract is a French contract they determine both these points by reference to French law. That this is the train of thought in the main followed by our judges is apparent from a study of such cases as *Jacobs v. Crédit Lyonnais*;¹ *In re Missouri Steamship Co.*;² and *P. & O. Co. v. Shand*.³ But if this be so, two results follow. The first is, that English Courts do not draw a broad distinction between the law governing the interpretation or effect and the law governing the legality or validity of a contract. The second is, that as the law which governs the interpretation of a contract is the "proper law of the contract,"⁴ or, in other words, the law or laws intended by the parties to apply to it, we are driven to the conclusion that, in general, and at any rate indirectly, the validity of a contract is governed by the proper law thereof.

This leads to the

Second theory. — *The essential validity of a contract is (subject to certain wide exceptions) governed indirectly by the proper law of the contract.*⁵

This theory is consistent not only with the language of English judges, but, what is of more consequence, with their mode of thought. They hold that a contract is governed by the law of the country with which it has most substantial connection, or, to put the matter shortly, to which it belongs, *i. e.*, that an English contract is governed by English law, an American contract by American law, and so forth. But when we ask what is the circumstance which in the main determines what is the country to which a contract belongs, we find that it is the intention of the parties, or, in other words, we are brought round again to the conclusion that the essential validity of a contract is in the main determined by the proper law thereof. We can now see what is the real meaning of English judges when they decline, as they often most rightly do, to be bound by any hard and fast rule as to the law governing the construction or validity of a contract. They do not intend to question the principle that a contract is governed by the

¹ 1884, 12 Q. B. D. (C. A.) 589.

² 1889, 42 Ch. D. (C. A.) 321.

³ 1865, 3 Moore P. C. N. s. 272.

⁴ See p. 540, *ante*.

⁵ See Rule 148, p. 553, *ante*, and compare especially *Westlake*, 3rd ed., p. 258, and *Nelson*, p. 266. *Westlake* comes nearly, but not quite, to the conclusion here expressed.

law or laws to which the parties intended to submit themselves, but do intend to express the perfectly sound doctrine that in ascertaining what this intended law is, a Court ought to take into account every circumstance of the case, and ought not to be tied down to any rigid presumption that the parties must have intended to be bound by a particular law, whether it be the *lex loci celebrationis*, or the *lex loci solutionis*.

The theory, again, that the material validity of a contract is governed by its proper law explains (if the wide exceptions thereto be taken into account) how it happens that the validity of a contract is constantly governed by the *lex loci solutionis*. The reason is none other than that the *lex loci solutionis* is more often than not the proper law of a contract.

In order, however, to do justice to the second theory, we must bear in mind its limitations, or, in other words, the width of the exceptions to the rule that the validity of a contract depends on its proper law.¹

These exceptions all flow from two obvious principles.

The first principle is that an English Court will not enforce any contract which is opposed to the law of England, or to the morality supported by the law of England.²

The second principle is that a contract will be held in general invalid in England which involves the doing in any civilised country of an act which is forbidden by the law of that country. This applies whether the unlawful act be the *making* of a contract or the *performance* of a contract.³

Our theory, moreover, is not, when rightly understood, really inconsistent with the views of the best writers.

Story holds that the nature, the obligation, and the interpretation of a contract are all governed by the same law,⁴ and this law, though at first sight one might suppose it from his language to be the law of the place where the contract is made, clearly is with him the law which the parties intended to adopt.⁵

Mr. Foote, no doubt following in this, it must be admitted, the language of Story, holds, as already pointed out, that the *lex loci solutionis* must be decisive. But all that is true in this theory is met by the consideration that the *lex loci solutionis* is more often than not the proper law of a contract, and that in general a contract is invalid which cannot lawfully be performed at the place of performance.

Westlake's opinion comes very near to the admission that the proper law of a contract is the law governing its validity.

"It may," he writes, "probably be said with truth that the law by

¹ See Exceptions 1-3 (pp. 558-560) to Rule 148, *ante*.

² For examples, see *Robinson v. Bland*, 1760, 2 Burr. 1077; *Grell v. Levy*, 1864, 16 C. B. n. s. 73; *Biggs v. Lawrence*, 1789, 3 T. R. 454; *Clugas v. Penaluna*, 1791, 4 T. R. 466; *Pearce v. Brooks*, 1866, L. R. 1 Ex. 213, and General Principle No. II. (A), (B), p. 32, *ante*.

³ See General Principle No. II. (C), p. 33, *ante*.

⁴ *Story*, s. 263.

⁵ Compare ss. 263 and 280.

"which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the law of the place of contract as such." ¹

But Westlake himself lays down that "a contract which is illegal by its proper law cannot be enforced," ² and in commenting on *Jacobs v. Crédit Lyonnais*,³ and *Re Missouri Steamship Co.*,⁴ writes: It "must be admitted that in both cases a stress was laid by the learned judges on the intention of the parties, as the governing element in the choice of a law, which is not in accordance with the discussion preceding the § [i. e., § 212], and which, where the lawfulness of the intention is itself in question, as it was in *Re Missouri Steamship Co.*, I still find it difficult to reconcile with the logical order to be followed." ⁵ Westlake, in short, apparently holds that the law generally governing a contract determines its essential validity, but does not think that its validity can in any way depend on the intention of the parties.

The truth is, that the doctrine laid down in Rule 148,⁶ and here advocated, is clearly open to one grave objection.

The proper law of a contract, it may be objected, is the law chosen by the parties and intended by them to govern the contract. If, then, it may be argued, the proper law of a contract determines its essential validity, the legality of an agreement depends upon the will or choice of the parties thereto; but this conclusion is absurd, for the very meaning of an agreement or promise being invalid is that it is an agreement or promise which, whatever the intention of the parties, the law will not enforce; the statement, for example, that under the law of England a promise made without a consideration is void, means neither more nor less than that the law will not enforce such a promise even though the parties intend to be legally bound by it, and this state of things cannot be altered by the fact that Englishmen contracting in England intend, and even in so many words express their intention, that a promise made by one of them, *X*, to the other *A*, shall, though made without a consideration, be governed by the law of a foreign country, and therefore be valid. The same objection is sometimes put in another shape. *X* and *A* enter in England into a contract to be performed partly in England and partly in another country, e. g., the Mauritius. The whole of it, or one of its terms, is valid by the law of England, but invalid by the law of the Mauritius. Is the contract or the term in question to be held valid or not? If you look to the intention of the parties, it is in the absence of fraud an almost certain presumption that they meant to contract with reference to the law which makes the contract valid. Hence, however, the result would

¹ *Westlake*, 3rd ed., s. 212, p. 258.

² *Westlake*, s. 213.

³ 12 Q. B. D. 589.

⁴ 42 Ch. D. 321.

⁵ *Westlake*, 3rd ed., p. 258.

⁶ See p. 553, *ante*.

follow that where there is a question between two possible laws under one of which a contract is, and under the other of which a contract is not valid, the contract must always be held valid.¹ But this result is absurd. Whatever form, in short, the objection takes, it amounts to this, that the essential validity of a contract cannot depend upon the choice of the parties thereto, but that to make the validity of a contract depend upon its proper law is to make its essential validity depend on the choice of the parties.

The reply to this objection is that its force depends on a misunderstanding of the principle contended for. No one can maintain that persons who really contract under one law can by any device whatever render valid an agreement which that law treats as void or voidable. What is contended is that the *bonâ fide* intention of the parties is the main element in determining what is the law under which they contract. To put the same assertion in another form, an English contract is governed by English law, a French contract is governed by French law; but when, say an Englishman and a Frenchman, or two Englishmen, enter in England into a contract to be wholly or partly performed in France, their *bonâ fide* intention is, at any rate, the chief element in determining whether the contract is an English contract or a French contract.² No doubt in deciding this matter, the Court must regard the whole circumstances of the case. As regards the interpretation of the contract, the expressed intention is decisive; as regards its essential validity or legality, this is not quite so certainly the case. If it is clear they meant to contract under one law, *e. g.*, the law of England, no declaration of intention to contract under another law so as to give validity to the contract will avail them anything. But this result follows because in the view of the Court their real intention was to enter into an English contract.

If this one solid objection to our theory be removed, the doctrine that, according, at any rate, to the view of English judges, the essential validity of a contract is determined by its proper law is, it is submitted, made out. It will be noted that in Rule 148,³ the statement is made that the essential validity of a contract is governed "indirectly" by its proper law. The word "indirectly" is inserted for the very purpose of showing that the parties cannot directly determine by their choice whether a contract shall be legal or not. What they can do is to determine what is the law under which they in fact contract, and the rules of this law, *i. e.*, the proper law will, subject, however, to wide exceptions, determine whether a contract is essentially valid or invalid.

¹ Compare *P. & O. Co. v. Shand*, 1865, 3 Moore P. C. N. s. 272.

² Compare *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589.

³ See p. 553, *ante*.

NOTE 13.

LAW GOVERNING CONTRACTS WITH REGARD TO IMMOVABLES.

What is the law governing a contract with regard to immovables or land?

The *capacity*¹ to enter into a valid contract with regard to land is certainly, and the *formalities*² necessary for the validity of such a contract are almost certainly, governed wholly by the *lex situs*. Our inquiry, therefore, concerns only the incidents or material validity³ of a contract with regard to immovables. As regards the answer to our question when thus reduced within its proper limits, two theories or doctrines are maintainable; they may for convenience be termed the doctrine of the *lex situs* and the doctrine of the proper law respectively.

(A) *Doctrine of the lex situs*. — Every question which can possibly arise with regard to rights over land must be answered in accordance with the *lex situs*; hence the validity and effect of a contract in respect of land is governed wholly by the *lex situs*. This appears, at any rate, to be the view maintained by Story.⁴ “The consent of the tribunals, acting under the common law, both in England and America, is, in a practical sense, absolutely uniform on the same subject [viz., the supremacy of the *lex situs* in regard to immovable property]. All the authorities, in both countries, so far as they go, recognise the principle in its fullest import, that real estate, or immovable property, is exclusively subject to the laws of the government within whose territory it is situate.”⁵ “The general principle of the common law is, that the laws of the place where such property is situate, exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them.”⁶ Though Story does not in so many words refer to contracts with regard to immovables, it is hardly possible to doubt that in his opinion every question whatever — including any inquiry as to the effect of a contract with regard to immovables — ought to be determined in accordance with the *lex situs*. This rule has many advantages. It is intelligible, it is simple, it avoids the necessity for nicely distinguishing between a contract and a conveyance, and in most cases it will undoubtedly be followed by English Courts.

(B) *Doctrine of the Proper Law*. — “Contracts relating to immovables are governed by their proper law as contracts, so far as the *lex situs* of the immovables does not prevent their being carried into execution.”⁷

¹ See p. 517, *ante*.

² See pp. 517, 518, *ante*.

³ See Exception 1, p. 524, *ante*, and especially Rule 151, p. 586, *ante*.

⁴ See p. 516, *ante*.

⁵ Story, s. 428.

⁶ Story, s. 424. Compare ss. 454, 430, 431, 435, 463.

⁷ Westlake, 3rd ed., p. 261, citing *Campbell v. Dent*, 1838, 2 Moore P. C. 292.

"A contract relating to immovables is governed and construed by "the proper law of its obligation, ascertained in accordance with the "principles enunciated in *Jacobs v. Crédit Lyonnais*." ¹

The doctrine enunciated by Mr. Westlake and Mr. Nelson is, therefore, if I understand it rightly, that a contract with regard to immovables is not wholly governed by the *lex situs*, but is at bottom governed by the law to which the parties intended it to be subject, which law constantly is, but need not necessarily be, the same as the *lex situs*. The practical consequence would seem to follow that the excuses for the non-performance of such a contract may depend upon some other law, *e. g.*, the *lex loci contractus*, and not upon the *lex situs*. Nor is there anything at bottom unreasonable in this. If *X*, an Englishman, agrees in England with *A* to do some act with regard to land in France, which he is unable to perform, there seems to be no injustice, if the parties really intended to be bound by the law of England, in holding that whether particular circumstances are or are not a legal excuse for non-performance of the contract by *X* should be determined in accordance, not with the law of France (*lex situs*), but with the law of England (*lex loci contractus*). Nor again is there anything inconsistent in this doctrine with the respect due to the authority of a foreign sovereign. No one maintains that an English Court can or will compel a person to perform, with regard to French land, a contract, the performance whereof is forbidden by French law; what is maintained is that if *X* agrees in England with *A* to do a particular act in France, he may be compelled in England to pay damages for not performing his promise, and that whether the non-performance is so far excused as to free him from liability to payment of damages is to be determined in accordance with English law.² The "doctrine of the proper law" is, however, open to criticism. Suppose the strongest case possible, *viz.*, that a contract made in England with regard to land in France contained a clause which stated in so many words that the contract should be governed by English law. Would any provision in such a contract opposed to the law of France be valid? The land is in France. Nothing can be done in relation to the land which is not in accordance with French law. The clause, therefore, in so far as English law agrees with French law, is needless, and in so far as English law disagrees with French law, is an attempt to evade French law in respect of matters to be done in France, and therefore should not be enforced by the Courts of any other country.³ There is, at any rate, a great deal to be said in favour of Story's doctrine that all matters connected with land, including the effect of contracts

¹ *Nelson*, p. 277.

² Compare especially, *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589, 603, *per Curiam*. This case, it is true, refers to a contract with regard to movables, but it does decide that an action is maintainable in England, for breach of a contract made in England to do an act in France which, when the time for performance arrived, could not be done without a breach of French law, and it is hard to see why the principle of *Jacobs v. Crédit Lyonnais* should not apply to contracts with regard to land as well as to contracts with regard to goods.

³ See Intro., General Principle No. II. (C), p. 33, *ante*.

in relation thereto, ought to be governed by the law of the country where the land is situate (*lex situs*).

(C) *Operation of the two doctrines.* — The doctrine of the *lex situs* and the doctrine of the proper law differ in their practical application far less than would at first sight appear, for whichever doctrine we adopt we must always bear in mind three considerations: —

First. No conveyance or transfer of land, or of an interest therein, which is not in accordance with the *lex situs*, will be held valid in England.

Secondly. The parties to a contract with regard to land do, as a matter of fact, generally intend the contract to be governed by the *lex situs*; the proper law, therefore, of the contract is in most instances the same as the *lex situs*.

Thirdly. No contract with regard to land, *e. g.*, in France, can be carried out if its performance be opposed to French law, and no English Court will ever attempt to compel any man to perform in France a contract which French law forbids. The most that our Courts will conceivably do is to make a man pay damages for inability to do in France something which he has promised to do there.

It matters, therefore, in practice very little whether we hold that a contract with regard to land is governed as to its incidents by the *lex situs*, or hold that such a contract is governed by its proper law. Still the two different doctrines may, though in rare instances, lead, to different results. That this is so may be seen from the following imaginary cases, in each of which it is for the sake of simplicity supposed that *X* and *A* are Englishmen domiciled in England, that the contract between them is made in England, and that it contains a clause providing that it shall, as far as possible, be governed by the law of England.

Case 1.—*X* contracts with *A* to make some disposition of land in France which French law renders impossible, *e. g.*, to entail the land upon *A*'s eldest son and his heirs.

If the contract is governed by the *lex situs* it is void, and no action can be maintained in England for the breach of it. If it is governed by the *lex loci contractus* (proper law) an action may apparently be maintained in England for breach of the contract, *i. e.*, *X* may be forced to pay damages for his inability to perform his promise.

Case 2.—*X* contracts with *A* to deal with land in France in some way which French law absolutely prohibits, *e. g.*, to use the land for some purpose which cannot be carried out without exposing *X* to penalties under the law of France. The contract whether it is governed by the *lex situs* or by its proper law (semble) is void,¹ and no action for the breach thereof can be maintained in England.

Case 3.—*X* agrees to convey land in France to *A*. At the time when the contract is entered into *X* is able to carry it out, but under a French law passed after the making of the contract, but before the conveyance of the land by *X*, it becomes impossible for *X* to convey the land to *A*, and *X* is excused from performance of the contract.

¹ See Rule 148, p. 553, *ante*.

If the contract be governed by the *lex situs*, no action is maintainable in England by *A* against *X* for non-performance of his contract. If the contract is governed by the *lex loci contractus* (proper law), an action (semble) may be maintainable in England by *A* against *X*.¹

Case 4.—*X* contracts with *A* to provide *A*, six months after the date of the contract, with a room in a foreign country for the performance there of a concert by *A*. Before the date for the performance of the concert some event occurs which under the law of England (proper law) would, if the room had been in England, have excused *X* from the performance of his contract and freed him from liability from damages for non-performance, but which, under the law of the foreign country, does not free *A* from such liability. If the contract is governed by the *lex situs*, an action is maintainable in England against *X* for breach of contract, but if, as would appear to be the case, the contract is governed by its proper law (*lex loci contractus*), an action for breach of contract is not maintainable in England by *A* against *X*.²

NOTE 14.

THE EWING v. ORR EWING CASE.³

D has died domiciled in Scotland, possessed of movable and immovable property there, and of only a small amount of personal property in England. He has appointed six persons executors and trustees under his will. Of these some reside in Scotland, some in England. They obtain confirmation of the will in Scotland, and the confirmation is sealed in England under 21 & 22 Vict. cap. 56.⁴ *A*, an infant legatee, resident in England, brings an action by his next friend for administration of the estate. The writ is served upon the trustees in England, and under an order upon the trustees in Scotland. The trustees appear without protest. It is held that the Court has jurisdiction to administer the trusts of the will as to the whole of the estate, whether in England or in Scotland, and that, as no proceedings are pending in a Scotch Court by which the interest of the infant could have been equally protected, the exercise of the jurisdiction is a matter not of discretion, but of justice.

This statement contains the essential circumstances, and gives the whole direct effect, of the English case of *Ewing v. Orr Ewing*.⁵ The decision of the House of Lords refers in strictness rather to proceedings against trustees than to proceedings against personal repre-

¹ Compare *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589, 603, *per Curiam*, and *Baily v. De Crespigny*, 1869, L. R. 4 Q. B. 180.

² Compare *Jacobs v. Crédit Lyonnais*, 1884, 12 Q. B. D. (C. A.) 589, and *Taylor v. Caldwell*, 1863, 3 B. & S. 826; 32 L. J. Q. B. 164.

³ 1883, 9 App. Cas. 34. And see *Ewing v. Orr Ewing*, 1885, 10 App. Cas. 453 (Scotch); *Westlake*, 3rd ed., pp. 114, 115; *Foote*, pp. 252-254, 266; 2 *Williams, Executors*, 9th ed., 1526-1531.

⁴ See Rule 120, p. 465, *ante*.

⁵ Compare the Scotch case, *Ewing v. Orr Ewing*, 1885, 10 App. Cas. 453.

sentatives. From this point of view the case does little more than carry out the principle involved in *Penn v. Baltimore*,¹ and all it appears absolutely to decide is that, where the executors of a person dying domiciled in a foreign country are also trustees under his will, the Court has jurisdiction to entertain an action for the execution of the whole of the trusts under the will against the trustees who are in England and the trustees who can be served with a writ in a foreign country.²

But though this is all which is necessarily decided in the English case of *Ewing v. Orr Ewing*, the following points with regard to the administration of a deceased person's property are raised and more or less authoritatively determined in the two *Orr Ewing Cases*.

(1) Lord Westbury's doctrine³ that the Courts of the country in which a deceased person is domiciled at the time of his death have *exclusive* jurisdiction to administer his movable property is negatived.

(2) Under an ordinary grant of administration the High Court has, on being appealed to, jurisdiction to administer the whole of the movable property of the deceased, whatever its local situation, and whether he has died domiciled in England or in a foreign country.

(3) The Courts of a foreign country, *e. g.*, Scotland, have a right, if they see fit, to deal with and administer property of the deceased locally situate in that country.⁴

(4) A personal representative under an English grant, which is not limited, is liable to account for assets out of England,⁵ but his liability in regard to foreign assets would seem to depend upon his relation to them, *i. e.*, upon his legal power to get possession of and deal with such assets.⁷

The result of the conclusions which may be deduced from or are suggested by the *Orr Ewing Cases* is that conflicts may undoubtedly arise between English Courts and the Courts of a foreign country as to the administration of a deceased person's movable property, and that "whenever a real conflict of jurisdiction does arise between two independent tribunals, the better course for each to pursue is to exercise its own jurisdiction so far as it availably can, and not to issue judgments proclaiming the incompetency of its rival."⁸ These words of Lord Watson's are a valuable recognition, be it noted, of the principle of effectiveness, or, in other words, of the principle maintained throughout this treatise, that a Court's jurisdiction ought to be limited by its power to enforce its judgments.⁹

¹ 1750, 1 Ves. Sen. 444. See Rule 39, Exception, p. 216, *ante*.

² Compare for this view of the case, *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34, 46, judgment of Lord Blackburn, and p. 48, judgment of Lord Watson, with *Ewing v. Orr Ewing*, 1885, 10 App. Cas. 453, 522, 523, judgment of Lord Blackburn.

³ *Enohin v. Wylie*, 1862, 10 H. L. C. 1, 13, 15, 16.

⁴ *Ewing v. Orr Ewing*, 1883, 9 App. Cas. 34, 39, judgment of Selborne, C.

⁵ *Ewing v. Orr Ewing*, 1885, 10 App. Cas. 453. See Rule 86, p. 398, *ante*.

⁶ See Rule 70, p. 345, *ante*.

⁷ Compare 2 *Williams, Executors*, 1526-1531.

⁸ *Ewing v. Orr Ewing*, 1885, 10 App. Cas. 453, 532, judgment of Lord Watson.

⁹ See Intro., General Principle No. III., p. 38, *ante*.

NOTE 15.

THE WILLS ACT, 1861.

24 & 25 VICT. CAP. 114.

An Act to amend the Law with Respect to Wills of Personal Estate made by British Subjects.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

4. Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act.

5. This Act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this Act.

NOTE 16.

QUESTIONS WHERE DECEASED LEAVES PROPERTY
IN DIFFERENT COUNTRIES.¹

A testator or intestate may, at his decease, leave property of different kinds in different countries, *e. g.*, movables in England and immovables in Scotland. And "where land and personal property are "situated in different countries, governed by different laws, and a "question arises upon the combined effect of those laws, it is often "very difficult to determine what portion of each law is to enter into "the decision of the question [of the distribution of, or claims upon, "the property]. It is not easy to say how much is to be considered as "depending on the law of real property [immovables]; which must be "taken from the country where the land lies [*lex situs*]; and how "much upon the law of personal property [movables]; which must be "taken from the country of the domicile; and to blend both together; "so as to form a rule, applicable to the mixed question, which neither "law separately furnishes sufficient materials to decide."² These words refer to the question how far the heir of heritable property in Scotland which an English will has been inoperative to pass, being a legatee of personal property in England, is put to his election. But they apply in principle to all the various questions which may arise when a deceased person leaves property of one description, *e. g.*, movables, in England, and property of another description, *e. g.*, immovables, in a foreign country. The general rule, no doubt, is that immovables or land, or rights, or obligations connected with land which are treated by the *lex situs* as immovables, are governed by the *lex situs*, and that movables or things treated by the law of the country where the things are situate as movables³ are governed by the law of the deceased's domicile (*lex domicilii*). But these two general principles do not lead us far towards answering the different inquiries now calling for consideration. In this Note it will be convenient to confine our attention almost exclusively to cases in which a testator or intestate leaves property of different kinds in England and in Scotland respectively.

The questions which, under these circumstances, may arise, or, at any rate, have arisen, refer in the main to three points:—

- (A) The *devolution* of the whole estate.
 - (B) The heir's right of *recourse* against the movables or personalty.
 - (C) The heir's *election* between taking under or against a will which, as to immovable property, is invalid.
- (A) *Devolution*.—The rule as to this is simple. Every question

¹ *Westlake*, 3rd ed., pp. 128-136; *Foote*, 2nd ed., pp. 186-192, 202-208; *Nelson*, pp. 198, 199.

² *Brodie v. Barry*, 1813, 2 Ves. & B. 127, 131, judgment of *Grant*, M. R.

³ See Rule 137, p. 513, *ante*.

as to the devolution of *immovables* (land) either under a will, or in case of intestacy, is to be determined by the law of the country where the immovables are situate¹ (*lex situs*). The *lex situs*, for example, determines whether an instrument, *e. g.*, a Scotch heritable bond,² conferring a right relating to an immovable, is itself an immovable; who is the person to whom the immovable descends; and whether a given will is valid as regards immovables.⁴ Every question, on the other hand, as to the devolution of movables, such as who is the person entitled to succeed to them beneficially; how they are to be distributed; whether a given will is valid as regards movables; must be determined in general by the *lex domicilii* of the deceased intestate or testator. It must, however, be here as elsewhere borne in mind that "personal property," if the term be accurately used, includes, but is not equivalent to, movable property,⁶ and that though the beneficial succession⁶ to movable property is under English law governed by the *lex domicilii* of the deceased, yet the administration⁷ thereof, *e. g.*, as regards the payment of debts, is under English law governed by the *lex fori*, which in this case is equivalent to the *lex situs*, *i. e.*, the law of the country (England) where the movable property or personalty is situate and administered.

(B) *Recourse*. — The heir or devisee of immovables in Scotland may have paid in Scotland debts due from the deceased. Can he have recourse against the personal estate in England for repayment? Of course, if the point is dealt with in the will of the deceased, then the rights and liabilities of the heir are governed by the will. If, for example, a testator who leaves personalty in England and real estate in Scotland directs that all his debts shall be paid out of his personal estate, then the right of the heir to look to the personalty in England for repayment of debts of the testator paid by the heir in Scotland is clear. If, however, the matter is not dealt with by the will, then "the right of the heir of foreign immovables . . . to have recourse against the personal estate in England for the amount of debts of the deceased which he has paid, is determined by the *lex situs* of the immovables."⁸ These are the words of Mr. Westlake; they give, therefore, as might be safely assumed, an answer to our inquiry which is, as far as it goes, correct.

A person has died domiciled in a foreign country. A, his heir, is compelled to pay debts due there out of land coming to him in such country as heir. But A has, under the law of such foreign country,

¹ See Rule 138, p. 516, *ante*, and compare Rule 137, and comment thereon, pp. 513-515, *ante*.

² *Brodie v. Barry*, 1813, 2 V. & B. 127; *Johnstone v. Baker*, 1817, 4 Madd. 474 (n); *Jerningham v. Herbert*, 1829, 4 Russ. 388. Heritable bonds are now under the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. cap. 101), s. 117, movables as regards the succession of the creditor in Scotland.

³ *Ibid*.

⁴ *Brodie v. Barry*, 1813, 2 V. & B. 127; *Dundas v. Dundas*, 1830, 2 Dow. & Cl. 349.

⁵ See pp. 71-73, 312, 313, *ante*.

⁶ See p. 315, *ante*.

⁷ See Rule 178, p. 674, *ante*.

⁸ *Westlake*, 3rd ed., p. 129.

a right to be repaid the amount of the debts out of the deceased's movables. *A* has, therefore, a right of recourse against the English personality left by the deceased.¹

The deceased, again, leaves real estate in Scotland and personality in England. *A*, his heir, pays ordinary debts of the deceased out of real estate in Scotland. Under Scotch law, he has a right to repayment out of the movable property of the deceased. He has, therefore, a right of recourse against the English personality.²

The heir of Scotch land pays, in 1830, sums due on heritable bonds given by the deceased. Such bonds are under Scotch law a charge upon the real estate, in other words, are payable by the heir. He has no right, therefore, to be repaid out of the English personal estate the sums paid in respect of the bonds.³

These cases illustrate and fall within Mr. Westlake's dictum, but they show, it is submitted, that that dictum, though true, is incomplete. The right of the heir of foreign, *e. g.*, Scotch, lands to have recourse against the personal property of the deceased in England is, no doubt, in one sense, governed by Scotch law (*lex situs*), for in order to have a claim against the personal estate in England, he must show that under Scotch law he has a right to repayment, but his right is in reality governed partly by the *lex situs*, and partly by the law of England (*lex fori*), *i. e.*, the law of the country where English personality is being administered. It is Scotch law which determines whether there is a debt due to the heir at all from the deceased's estate. It is English law which determines that all debts due from the deceased's estate are primarily payable out of English personality.⁴

Whether, again, the heir or devisee of English lands who is compelled to pay debts due from the deceased can have recourse for repayment against the movables of the deceased in a foreign country must, it is conceived, on principle depend partly upon English law (*lex situs*), and partly upon the law of the country, *e. g.*, Victoria, where the deceased's movable property is being administered. Under the law of England, *A*, the heir, has a claim against the personal estate out of which the debts are primarily payable.⁵ This would *prima facie* give him a claim against the movables of the deceased administered in Victoria, but whether the claim is enforceable in Victoria must ultimately depend upon the law of Victoria.

(C) *Election*. — "Election, in the sense here used, is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person, from whom he derives one, that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has

¹ *Anon.* 1723, 9 Mod. 66.

² *Winchelsea v. Garety*, 1838, 2 Keen, 293.

³ *Elliott v. Minto*, 1821, 6 Madd. 16; *Drummond v. Drummond*, 1799, 6 Bro. P. C. 601.

⁴ The liability of English personality to the payment of foreign debts of the personal estate and before its distribution is independent of the deceased's domicile.

⁵ See 2 *Williams, Executors*, 9th ed., p. 1561.

"a right to control one or both, that one should be a substitute for the other. The party, who is to take, has a choice, but he cannot enjoy the benefits of both."¹

A question as to election may arise where *T*, a testator, dies, leaving property in England and in a foreign country, and has made a will which, though intended to affect the whole of his estate, is, from some cause or other, valid as to the property in England, but invalid as to the foreign property. In such a case can a person, *e. g.*, an heir, who takes a benefit under the will in England, be allowed at the same time to gain from its invalidity in the foreign country, or may he be put to his election either to treat the whole will as valid, or, if he takes advantage of its invalidity in the foreign country, to give up the benefit which he would otherwise gain from its validity in England?²

T, for example, who is domiciled in England, leaves movable property in England and immovable property in Scotland. He has made a will which, as regards his immovable property or land in Scotland, is invalid, and by his will leaves the Scotch land to *N*. He leaves his personal property in England to *A*, who is his heir under Scotch law. The question arises, can *A* both take the Scotch land by descent and, at the same time, take the benefit of the legacy to him of the English personalty, or must he renounce either his rights as heir or his rights as legatee, *i. e.*, is he put to his election?

This question, so far as it depends on a conflict of laws, can, it is submitted, come directly before the English Courts as a question of English law only where *T* either leaves immovable property in England as well as immovable property in some other country, *e. g.*, Scotland,³ or, what is the more common case, where *T*, *being domiciled in England*, leaves movables either in England or elsewhere, and also leaves immovables in some other country, *e. g.*, Scotland.⁴ The question as to election could not come before the Courts as a question of English law, where *T* neither left immovables in England, nor was domiciled in England. In the latter case he might, no doubt, leave movables locally situate in England, but the right to them would depend upon the law of *T*'s domicile, and the question of election, if it arose at all, though it might conceivably come before the English Courts, would be determined by the law of *T*'s domicile, not of England. Thus if *T* died in England, leaving goods there, and also leaving land in Scotland which did not pass under his will, but was domiciled in France, the question (if any arose) as to election, would probably come before the French Courts, and ought, if it should come before the English Courts, to be decided by reference to French law.

¹ 2 *Story, Equity Jurisprudence*, 12th ed., s. 1075.

² Compare *Brodie v. Barry*, 1813, 2 V. & B. 127; *Allen v. Anderson*, 1846, 5 Hare, 163; *Dundas v. Dundas*, 1830, 2 Dow. & Cl. 349.

³ Compare *Dundas v. Dundas*, 1830, 2 Dow. & Cl. 349, which is a Scotch not an English case, and *Dewar v. Mailand*, 1866, L. R. 2 Eq. 834; *Orrell v. Orrell*, 1871, L. R. 6 Ch. 302.

⁴ *Brodie v. Barry*, 1813, 2 V. & B. 127; *Anon.* 1723, 9 Mod. 66; *Trotter v. Trotter*, 1828, 4 Bli. 502; *Winchelsea v. Garetty*, 1838, 2 Keen, 293; *Allen v. Anderson*, 1846, 5 Hare, 163; *Harrison v. Harrison*, 1872, L. R. 8 Ch. 342.

Bearing in mind these considerations, we may, it is conceived, lay down the following Rule: —

If a testator devises foreign immovable property (foreign land) under a will which is inoperative to pass the same to the devisee, and also either

- (1) *devises English immovable property (English land) to the heir of the foreign immovable property, or,*
 - (2) *being domiciled in England, bequeaths movable property wherever situate to the heir of the foreign immovable property,*
- the Court will not allow such heir to take any benefit under the will, as regards the English immovable property or the movable property, unless he fulfills the conditions of the will with respect to the foreign immovable property, i. e., the heir is put to his election.¹*

Thus “the heir of heritable property in Scotland, becoming entitled to it in consequence of the will, by which it is devised to another, “not being conformable to the solemnities required by the law of “Scotland, and taking also under the same will real or personal property in this country, will be compelled to elect between the heritable “property which has descended to him as heir, and the benefits given “to him by the will.”²

If, for the sake of clearness, we assume that a deceased person has left immovable property in Scotland, and has died domiciled in England, leaving there only movable property, the conditions under which the rule as to election applies may be thus stated: —

First. *T*, the deceased, must die testate; the rule cannot apply to a case of total intestacy.

Secondly. *T* must leave a will intended to deal both with the English movable property or personalty and with the Scotch immovable property. If the will, in the opinion of the English Courts, is not intended to apply to the Scotch immovable property or land, then no question of election arises;³ the Scotch heir takes any benefit conferred upon him by the will as legatee, and succeeds as heir to the Scotch immovable property. Whether *T* does intend to deal by his will with the Scotch land is a matter of construction to be decided by the law of the country where *T* dies domiciled, i. e., by English law.⁴ The answer to this inquiry is complicated, in the reported cases on the subject, by the rule of English law that merely general terms, such as “all my real and personal estate wherever situate,” are not sufficient to show an intention on the part of the testator to deal with property incapable of passing under the will.⁵ Hence it may happen that an heir of immovable property in Scotland may take a benefit under a will of English personalty, and also take the Scotch lands by descent, on the ground that, in the opinion of the Court, the will was not

¹ Foote, 2nd ed., pp. 202-206; Nelson, p. 199.

² 1 White & Tudor, L. Cas., 6th ed., p. 419.

³ At any rate in England. What might be the view taken by the Scotch Courts is a question with which we are not here concerned.

⁴ Allen v. Anderson, 1846, 5 Hare, 163; Trotter v. Trotter, 1828, 4 Bli. 502.

⁵ Maxwell v. Maxwell, 1852, 2 De G. M. & G. 705.

intended to deal with the Scotch lands, though to any layman reading the will it would certainly seem that the testator used expressions wide enough to include his Scotch immovable property.

Thirdly. The will must be invalid as to the Scotch immovable property. Whether it is invalid or not is to be determined by Scotch law (*lex situs*).

If these conditions are fulfilled, the heir cannot, while taking the Scotch land by descent, also take any benefit under the will as regards the English personal property. He must treat the will either as valid or invalid. If he takes a share in the English personalty under the will, he must not take the Scotch immovable property by descent, *i. e.*, he is put to his election.

If these conditions are not fulfilled, he is not put to his election.¹

1. *T* (the testator), domiciled in England, dies possessed of immovable (heritable) property in Scotland, and movable property (personalty) in England, Scotland, and elsewhere. *T*, by his will, devises the Scotch immovable property and bequeaths the movable property to trustees in trust to divide the whole equally amongst his nephews. The will is, under Scotch law, invalid as to the Scotch immovable property. *A*, one of the nephews, is under Scotch law heir to the Scotch immovable property. *A* is put to his election either to take the Scotch immovable property against the will as heir and give up his claim as legatee, or, if he takes his share as legatee, to let the Scotch immovable property go according to the will.²

2. *T*, domiciled in England, dies possessed of movable property and also of immovable property in Scotland. He devises his immovable property in Scotland to *B*, and also bequeaths equal shares in his movable property to *A* and *B*. The will is, under Scotch law, inoperative as to the Scotch immovable property. *A* is *T*'s heir under Scotch law. *A* is put to his election whether he will take the Scotch immovable property as heir, or the bequest of movable property as legatee.³

3. *T*, domiciled in England, directs by will that "the whole of his property" should be divided equally amongst *A*, *B*, and *C*, his brothers and sisters. *T* leaves Scotch immovable property. The will, as to the Scotch immovable property, is invalid. *A* is *T*'s heir, and takes the Scotch land. He is not put to his election, *i. e.*, he also takes his share as legatee. The reason is, that the words "the

¹ The law of Scotland as to election is apparently in substance the same as that of England. Hence questions may come before Scotch Courts as to the rights of an English heir who claims both to inherit English land on the ground that a Scotch will is invalid to pass it, and also to take a share in Scotch personal property under the will.

The reason further why English wills were constantly invalid as regards Scotch immovable property is that, prior to 1868, such property did not pass under an English will in the ordinary form. The Scotch Act of 1868 (31 & 32 Vict. cap. 101), s. 20 has apparently put Scotch immovable property, as regards testamentary disposition, in the same position as movable property, and has thereby removed the main source of conflict between English and Scotch law as regards wills of immovable property.

² *Brodie v. Barry*, 1813, 2 V. & B. 127.

³ *Harrison v. Harrison*, 1872, L. R. 8 Ch. 342.

whole of *T*'s property" do not show an intention to devise the Scotch immovable property.¹

NOTE 17.

LIMITS OF TAXATION IN RESPECT OF DEATH DUTIES AND DUTIES OF INCOME TAX.²

INTRODUCTION.

This Note is concerned with the Death Duties and the Duties of Income Tax, or, more shortly, Income Tax.

DEATH DUTIES. — All the death duties are duties imposed upon the devolution of property on, or in consequence of, a person's death. They now consist of three different duties: ³ —

(1) *Legacy Duty*.⁴ — This duty is charged on legacies⁵ under a will, and shares in the distributable residue⁶ of an intestate's personal estate; legacy duty is now⁷ in general, though not quite invariably,⁸ chargeable only on the deceased's movable property.

(2) *Succession Duty*. — This is a duty charged upon the succession to any property, whether real or personal, whether immovable or movable, to which one person succeeds⁹ on the death of another, but which is not charged with legacy duty.¹⁰

(3) *Estate Duty*. — This is a duty chargeable on the principal value of all property, real or personal, settled or not settled, or, in other words, on all immovable or movable property which passes on the death of any person dying after the 1st August, 1894.¹¹

¹ *Trotter v. Trotter*, 1828, 4 Bli. 502. See also, *Allen v. Anderson*, 1846, 5 Hare, 163; *Maxwell v. Maxwell*, 1852, 2 De G. M. & G. 706, with which contrast *Orrell v. Orrell*, 1871, L. R. 6 Ch. 302, and *Harrison v. Harrison*, 1872, L. R. 8 Ch. 342.

² See *Hanson, Probate, Legacy, etc. Acts*, pp. 16, 17, 22-24, 67, 68, 219-227; *Norman, Digest of Death Duties*, pp. 35-37, 68, 176, 178 (legacy duty), pp. 78, 79, 113, 114 (succession duty); *Wealake*, 3rd ed., pp. 124-128; *Nelson*, pp. 376-382; *Dowell, Income Tax Laws*, 4th ed., especially pp. 242-248 on Income Tax Act, 1853, s. 2, schedule (D).

³ PROBATE DUTY AND ACCOUNT STAMP DUTY. — Reference to these duties is purposely omitted; they are in general superseded by Estate Duty under the Finance Act, 1894 (see *Freeth, New Death Duty*, pp. 3, 4, 18, 19; Finance Act, 1894 (57 & 58 Vict. cap. 30), s. 1).

These duties, however, still affect property passing on the death of a person dying before 2nd August, 1894.

⁴ As to Legacy Duty, see 36 Geo. III. cap. 52; 45 Geo. III. cap. 28; and, in relation to Ireland, 54 Geo. III. cap. 92; 56 Geo. III. cap. 56; 5 & 6 Vict. cap. 82; and 43 Vict. cap. 14; 44 Vict. cap. 12; and *Norman*, p. 251.

⁵ For definition of "legacy," see 36 Geo. III. cap. 52, s. 7; 45 Geo. III. cap. 28, s. 4; 8 & 9 Vict. cap. 76, s. 4; *Norman*, pp. 35-37.

⁶ See 36 Geo. III. cap. 52, s. 2.

⁷ Succession Duty Act, 1853 (16 & 17 Vict. cap. 51), s. 19.

⁸ For exceptional cases in which legacy duty may still be chargeable on immovable property, see *Chatfield v. Berchtoldt*, 1872, L. R. 7 Ch. 192; *Norman*, pp. 68, 178; and note that legacy duty is payable in respect of chattels real (immovables) directed to be sold by will.

⁹ Succession Duty Act, 1853 (16 & 17 Vict. cap. 51), ss. 1, 2, 10.

¹⁰ *Ibid.*, s. 18.

¹¹ Finance Act, 1894, ss. 1, 2, 24.

Legacy duty and succession duty both differ from estate duty in one respect. They are duties on the beneficial succession — using the word “succession” in a wide sense — to property by one person on the death of another, and ultimately fall upon the beneficial successor. Estate duty is, as was probate duty, a duty on the collection or distribution of an estate passing on a person’s death. It falls on the estate, and does not fall upon a beneficiary as such. Thus if *D*,¹ a deceased person, has left a large estate more than sufficient to pay all claims upon it, and has bequeathed a legacy of £1,000 to *A*, legacy duty falls upon and is ultimately paid by the legatee, *i. e.*, is deducted from the £1,000; estate duty does not fall upon the legatee, but falls upon the estate, and is ultimately paid by the person or persons to whom, after payment of legacies and the like, the estate comes, *e. g.*, the heir or residuary legatee.

INCOME TAX. — This is at once a property tax and a tax on income. As a property tax it may be described as a tax on land or immovable property in respect of the annual value thereof, and is charged² under or in accordance with Schedules A and B of the Income Tax Act, 1853 (16 & 17 Vict. cap. 34), s. 2. As an income tax it may in very general terms be described as a tax on the “annual profits, gains, or interest,” or in popular language, “income,” which a person derives from property, from investments, from a trade or profession, or from any other source. As a tax on income, it is charged under or in accordance with Schedules C, D, and E of the Income Tax Act, 1853.

Death duties and duties of income tax are all imposed or kept in force by Acts of the Imperial Parliament, and now³ by Acts which extend to the whole United Kingdom.

With regard to any of these duties two questions may be asked: —

First. What is the nature of the property in respect of which the duties are imposed?

This inquiry is one which has no immediate connection with the subject of this treatise, and an answer sufficient for our present purpose has already been given to it in very general terms.⁴

Secondly. What are the limits within which the Acts imposing death duties and income tax operate, or in other words, what are the limits within which duties are imposed by these Acts on the property of the kind to which they apply?

This inquiry, though it does not form part of is closely connected

¹ “*D*” is used throughout this Note for the deceased person on whose death property devolves.

² Duties of income tax are of course imposed under the annual Income Tax Act, though they are charged in accordance with Schedules A to E of the Income Tax Act, 1853; these schedules originally formed part of the Income Tax Act, 1842 (5 & 6 Vict. cap. 35), which still in most matters regulates the collection and incidence of the tax.

³ Up to 1853 the Income Tax Acts did not extend to Ireland.

⁴ A more minute or complete reply, if needed, must be sought for from the treatises on each kind of duty, such for example as *Norman, Digest of Death Duties*; *Hanson, Probate, Legacy, and Succession Duties Acts*; *Freeth, New Death Duty*; and *Dowell, Income Tax Laws*.

with the subject of this treatise. To answer this inquiry, or, in other words, to fix, in the case of each of the duties under consideration, the limit of taxation, is the object of this Note.

For every taxing Act must have some limit to its operation. It is impossible to suppose that Parliament means to tax a particular kind of property, *e. g.*, legacies or land, under all circumstances, all the world over,¹ and, though we must in each case determine as far as possible from the language of each statute what are the limits within which Parliament intends to exercise its taxing power, one general remark may be made which applies to every tax now imposed by the Imperial Parliament.² This observation is, that, since the close of the contest with the American Colonies, Parliament has never intentionally taxed property which is wholly and exclusively connected with a country which, even though it belong to the British dominions, does not form part of the United Kingdom. In other words, the property on or in respect of which duties or taxes are imposed by Parliament is always property which has some territorial connection with the United Kingdom, or part thereof. The connection, indeed, with the United Kingdom, which renders property liable to taxation by the Imperial Parliament, may arise from various different causes. It may arise from the property being in fact situate in the United Kingdom;³ from the owner of the property being or having been resident⁴ or domiciled⁵ in the United Kingdom; from the title to the property depending upon the law of some part of the United Kingdom, *i. e.*, in popular but not quite accurate language, upon British law;⁶ or from the fact that some transaction connected with the property taxed has relation to the United Kingdom, as, *e. g.*, where income tax is charged on the profits of a trade exercised in the United Kingdom.⁷ But though the circumstances which so connect property with the United Kingdom as to render it taxable are various, yet wherever property is taxable some connection always exists. The problem as regards any given duty, *e. g.*, legacy duty or estate duty, is to determine what is the circumstance which so connects property with the United Kingdom as to render it liable to the particular duty. The answer may be supplied by the express terms of the statute imposing the duty, or, what is more generally the case, the answer, not being given by the express terms of the taxing Act, must be inferred (with the aid, where obtainable, of judicial decisions) from the nature of the property taxed, and from the general terms and tenour of the

¹ See particularly, *Wallace v. Attorney-General*, 1865, L. R. 1 Ch. 1, 6, judgment of Cranworth, Ch.

² See 18 Geo. III. cap. 12.

³ Income Tax Act, 1853, s. 2, Scheds. A and B. Compare Finance Act, 1894, ss. 1, 2.

⁴ Income Tax Act, 1853, s. 2, Sched. D.

⁵ Legacy Duty Act, 1796, 36 Geo. III. cap. 52; *Thomson v. Advocate-General*, 1845, 12 Cl. & F. 1.

⁶ Throughout this Note the term "British" is used as meaning belonging to the United Kingdom, and "foreign" as meaning not British, and "abroad" as meaning outside the United Kingdom.

⁷ Income Tax Act, 1853, s. 2, Sched. D, para. 2; *Ericson v. Last*, 1881, 8 Q. B. D. (C. A.) 414.

statute or statutes imposing the duty or regulating the collection thereof.

In this Note we are dealing with taxes or duties each of which are imposed both on immovable property and on movable property.

IMMOVABLE PROPERTY.

The liability of immovable property or land, if otherwise chargeable with either death duties or duties of income tax, is determined wholly by its actual local situation.¹

Rule. Immovable property situate in the United Kingdom is liable to death duties and duties of income tax. Immovable property not situate within the United Kingdom is not liable to any of these duties.

*This Rule is not affected by the domicile or residence of the owner of the property.*²

This principle might in fact be stated, as to its negative side, in an even broader form. An Act of the Imperial Parliament never imposes duties on or in respect of immovable property which is not situate in the United Kingdom.

Legacy duty³ and succession duty are imposed on immovable property, *e. g.*, land and houses, if otherwise chargeable, throughout the United Kingdom, and (wide as are the terms of the enactments imposing these duties) are admittedly⁴ not imposed on any immovable property whatever which is situate out of the United Kingdom. Estate duty, again, is charged in respect of property situate in any part of the United Kingdom, but as regards property situate out of the United Kingdom is charged only on property which is liable to legacy duty, or to succession duty,⁵ and therefore is not charged on any foreign immovable.

Income tax, lastly, in so far as it is payable in respect of immovables, is, by the terms of Schedules A and B, expressly made payable in respect of the property and occupation respectively in or of "lands, tenements, hereditaments, and heritages, *in the United Kingdom.*"

The result is, that, while land in London, in Dublin, in Edinburgh, in the Isle of Wight, or in Zetland, may be liable to the death duties or to income tax, land in Guernsey, or in the Isle of Man, is certainly not liable either to the death duties or to income tax.

The principle, however, that duties are not imposed on or in respect of immovable property outside the United Kingdom must be taken subject to this limitation; that, though duties are not imposed by Parliament in respect of the ownership, possession, or devolution of foreign land, they may be, and certainly sometimes are, imposed on

¹ See, as to legacy duty, *Hanson*, 3rd ed., pp. 16, 17, and *Chatfield v. Bercholdt*, 1872, L. R. 7 Ch. 192; and the principle there laid down clearly applies to succession duty and estate duty, as to which compare *Freeth, New Death Duty*, p. 35. As to income tax, see Income Tax Act, 1853, Scheds. A and B, the operation of which is *eo nomine* confined to lands in the United Kingdom.

² *Ibid.*

³ *Chatfield v. Bercholdt*, 1872, L. R. 7 Ch. 192.

⁴ *Hanson*, 3rd ed., pp. 16, 17.

⁵ Finance Act, 1894, s. 2. sub-s. 2.

the proceeds or produce of foreign land, at any rate when transmitted to the United Kingdom.¹

Whenever in this Note it is stated that property is liable to a tax, or that duties are payable in respect of such property, the statement must always be taken subject to some such reservation as "if otherwise chargeable." When, for instance, it is asserted that immovable property situate in the United Kingdom is liable to death duties, what is meant is that to such property the Acts imposing the duties apply. It is not meant that such Acts impose duties upon all immovable property, without exception, within the United Kingdom.

MOVABLE PROPERTY.

(A) *Death Duties.*

The incidence of the different death duties is determined by different rules. The principle which fixes liability to legacy duty and to succession duty is, at any rate, not in all respects the same as the principles on which depends liability to estate duty.

Legacy Duty and Succession Duty.

The enactments imposing these duties do not in express terms fix the limit within which the Acts operate, or, in other words, the limit within which the duties are imposed.² It was, therefore, absolutely necessary to put some limit on the general terms imposing the duty; for "without such a limitation, the Legacy Duty Act, for example, "would have been applicable, although neither the testator nor the "legatee, nor the property devised or bequeathed, was within or had "any relation to the British dominions. A construction leading to "this result was obviously inadmissible."³ And as some limitation must be found, that limitation, it has been judicially laid down, at any rate with regard to succession duty, "can only be a limitation "confining the operation of the words [imposing the duty] to persons "who become entitled by virtue of the laws of this country."⁴ The limits, then, of taxation, in the case both of legacy duty and of succession duty, are determined by, or based upon, one and the same general principle, which may be thus expressed:—

General Principle. Legacy duty and succession duty are imposed on that movable property, and on that movable property only, which the

¹ See, e. g., as to legacy duty, *Forbes v. Steven*, 1870, L. R. 10 Eq. 178; *In re Stokes*, 1890, 62 L. T. 176. As to income tax, see Income Tax Act, 1853, s. 2, Sched. D, para. 1; *Cesena Sulphur Co. v. Nicholson*, 1876, 1 Ex. D. 428; *Imperial Continental Gas Association v. Nicholson*, 1877, 37 L. T. n. s. 717; and *Sao Paulo Ry. Co. v. Carter*, [1895] 1 Q. B. (C. A.) 580; [1896] A. C. 31.

² See *Thomson v. Advocate-General*, 1845, 12 Cl. & F. 1; *Wallace v. Attorney-General*, 1865, L. R. 1 Ch. 1, 6-9, judgment of *Cranworth*, C.; *Colquhoun v. Brooks*, 1889, 14 App. Cas. 493, 503, judgment of *Herschell*, C.

³ *Colquhoun v. Brooks*, 1889, 14 App. Cas. 493, 503, 504, judgment of *Herschell*, C.

⁴ *Wallace v. Attorney-General*, 1865, L. R. 1 Ch. 1, 9, judgment of *Cranworth*, C. "This country" means "England" in the particular case, but the principle laid down is clearly applicable to the United Kingdom.

*legatee, distributee, or, to use a more general term, the successor, claims under, or by virtue of British law.*¹

"The question," says Lord Cranworth in reference to a particular case, "is whether, where a person domiciled abroad makes a will 'giving personal property' in this country by way of legacy, the legatee is a person *becoming entitled* to that property within the true 'intent and meaning of the second section [of the Succession Duty Act, 1853]. I think not. I think that, in order to be brought 'within that section, he must be a person who becomes entitled by 'virtue of the laws of this country. . . .

"The only safe way of solving this question [*i. e.*, the question as 'to the limitation on the imposition of succession duty], as that relating to legacy duty, is to consider the duty as imposed only on those 'who claim title by virtue of our law.'"²

These words lay down the principle which at bottom determines the liability to legacy duty and succession duty. They also enable us to estimate the true position and worth of two other principles which have been suggested for determining, in the case of these duties, the limit of taxation.

The first of these suggested principles is that the limit ought to be fixed by the local situation of the deceased person's movable property. This contention is now clearly untenable; it may, however, contain a slight amount of truth. The local situation of a deceased person's movable property may occasionally — though this is by no means certain — be an element in determining whether the title of the successor depends upon British law, and therefore whether the property is or is not liable to succession duty.

A second suggested principle, which is still often laid down, is that liability to legacy duty and to succession duty depends, subject in the case of succession duty to various exceptions, upon the domicile of the deceased owner.

That this statement always holds good in the case of legacy duty, and often holds good in the case of succession duty, is certain; yet domicile does not, it is submitted, of itself supply in either instance the ultimate ground of liability.

The explanations, it may be noted, of the dogma that liability depends on the deceased's domicile are of two kinds, and neither of them is satisfactory.

First. The doctrine is justified or explained by reference to the maxim *mobilia sequuntur personam*.³ Acts of Parliament, it is said, are meant to impose duties on property situate within the United Kingdom; but movable property is (by a fiction of law) considered to be situate wherever the owner is domiciled. If, therefore, the owner

¹ *Wallace v. Attorney-General*, 1865, L. R. 1 Ch. 1, 7, 8, judgment of Cranworth, C. For meaning of "British," see note 6, p. 783, *ante*.

² Which clearly means here "movable" property.

³ *Wallace v. Attorney-General*, 1865, L. R. 1 Ch. 1, 7, 8, judgment of Cranworth, C.

⁴ See *Hanson, Legacy and Succession Duty*, 3rd ed., pp. 16, 17, 219-228. Mr. Hanson's work contains an admirable statement of the cases and law with regard to the effect of domicile on liability for duties of succession.

is domiciled within the United Kingdom, his movables are situate in the United Kingdom, and, therefore, are subject to duty. If the owner is not domiciled in the United Kingdom, his movables are not situate there, and are not subject to duty. This view is recommended by its apparently placing the liability to duties on immovable property and on movable property upon the same basis, viz., the situation of the property, but this result is attained by an ambiguous and confusing use of terms. "Situation" is applied to immovable property in its natural sense of actual local position; whilst "situation" is applied to movable property as meaning the place where movable property is supposed by a fiction of law to be situate, viz., the country where the deceased owner was domiciled at the time of his death.

This explanation, moreover, does not really explain the only matter which needs explaining. For the point to be made clear is, why it is that in a particular case movables are treated as subject to the law, not of the country where they are situate, but of the owner's domicile; and the maxim *mobilia sequuntur personam*, being merely a short form of stating the fact that movables are for some purposes treated, whatever their actual situation, as subject to the law of their owner's domicile, cannot serve as an explanation of the reason why in any particular case they are so treated. The general statement of a fact cannot, that is to say, explain part of the fact which it states.

Secondly. The rule in question is sometimes rested on the ground that some limit must be placed on the class of persons to whom the Acts imposing legacy duty and succession duty are intended to apply. These enactments are not intended to apply to all the world, and the most natural assumption is, it is argued, that the persons intended to be within their scope are persons domiciled in England.¹ There is, perhaps, some difficulty in seeing why the particular limitation of domicile should necessarily have been adopted; and, further, if taxes on succession are looked upon as taxes on persons rather than on property, why such a tax should affect the real property in England of a person domiciled in a foreign country. This view also, whatever its worth, does not explain the cases in which the movables of a person not domiciled in the United Kingdom are liable to succession duty.²

Our general principle,³ however, explains both the cases in which the domicile of a deceased person does and the cases in which it does not determine the liability of his movable property to one or other of the duties under consideration. The explanation is this: in many instances (*e. g.*, in every case where the liability of movables to legacy duty is in question)⁴ the domicile of the deceased determines what is the law in virtue of which a person is entitled to succeed to the deceased's movable property, and therefore indirectly determines whether such property is or is not liable, as the case may be, to legacy duty or to succession duty; but in other instances the domicile of the

¹ *Wallace v. Attorney-General*, 1865, L. R. 1 Ch. 1.

² *Attorney-General v. Campbell*, 1872, L. R. 5 H. L. 524, 529, 530; *In re Cigala's Trusts*, 1878, 7 Ch. D. 351, 354, remark of Jessel, M. R.

³ See p. 785, *ante*.

⁴ See chap. xxx., *ante*.

deceased may not determine¹ what is the law in virtue of which another person is entitled to succeed to the deceased's movable property, and therefore often does not determine whether such property is or is not liable to succession duty. The cases, in short, in which a successor's liability is apparently determined by the domicile of the deceased, as also the cases in which it is not so determined, are applications and illustrations of the general principle that liability depends upon the result of the inquiry whether a successor's title does or does not depend upon British law.

But, though one and the same principle at bottom governs liability both to legacy duty and succession duty, this principle gives rise to different rules in regard to each duty.

*Rules as to Legacy Duty.*²

*Rule 1. The movable property of a deceased person who has not died domiciled in the United Kingdom is, wherever locally situate, not liable to legacy duty.*³

This rule holds whether the deceased has died intestate or testate. It is a clear application of our general principle, for the title of the distributee or legatee to the property of the deceased depends on the deceased's *lex domicilii*,⁴ and therefore, as he has died domiciled out of the United Kingdom, does not depend on British law.

D has died domiciled in Demerara, possessed of movable property situate in Scotland. The property is not liable to legacy duty.⁵

*Rule 2. The movable property of a deceased person who has died domiciled in the United Kingdom is, wherever locally situate, liable to legacy duty.*⁶

This rule holds whether the deceased has died intestate or testate. It is a clear application of our general principle.

1. The deceased has died resident in India, but domiciled in England. All his movable property is situate in India. The whole of the property is liable to legacy duty.⁷

2. *D*, domiciled in England, is a partner in a firm carrying on business at Bombay, where the firm holds freehold land, which is a partnership asset and (under English law) personal property. After *D*'s death the freehold land is sold, and *D*'s share in the purchase-moneys transmitted to *D*'s personal representatives in England. The share is liable to legacy duty.⁸

3. *D* dies domiciled in England, being partner with his brother in a sheep farm in New Zealand. Part of the partnership property is freehold land in New Zealand. On the death of his brother, *D* is

¹ See pp. 790-794, *post*.

² *I. e.*, Rules 1 and 2.

³ *Thomson v. Advocate-General*, 1845, 12 Cl. & F. 1.

⁴ See chap. xxx., *ante*.

⁵ *Thomson v. Advocate-General*, 1845, 12 Cl. & F. 1.

⁶ *In re Ewin*, 1830, 1 C. & J. 151; *Attorney-General v. Napier*, 1851, 6 Ex. 217; 20 L. J. Ex. 173.

⁷ *Attorney-General v. Napier*, 1851, 6 Ex. 217.

⁸ *Forbes v. Steven*, 1870, L. R. 10 Eq. 178.

entitled to four sevenths of partnership property. *D* devises his share to trustees in trust to sell, and with powers of management till sale, and upon trust to divide the produce till the sale among thirteen charities in England. The partnership property is not sold, but the income thereof is paid into the High Court. The funds in Court are divided among the charities. The whole fund is liable to legacy duty.¹

*Rules as to Succession Duty.*²

Rule 3. Movable property wherever situate, which a successor claims under a will, or under the intestacy of a deceased person dying domiciled out of the United Kingdom, is not liable to succession duty.

Under this rule, movable property which, on account of the deceased owner's foreign domicile, is exempt from legacy duty,³ is not liable to succession duty. This appears to be the whole effect of the decision in *Wallace v. Attorney-General*. "No one reading the Succession "Duty Act could suppose that, though it had no effect on legatees "under the wills of testators domiciled in this country, it yet would, "by changing the name of legacy into that of succession, totally alter "the rights of persons claiming title to personal property in this "country under the wills [or under the intestacy] of persons domiciled "abroad."⁴

The rule, be it noted, applies only to "wills" in the strict sense of that term, and not to wills made in exercise of a power of appointment conferred by an English instrument.⁵

D dies domiciled in France, having bequeathed movable property situate in England to *A*. The property is not liable to succession duty.⁶

Rule 4.⁷ Movable property wherever actually situate, which a successor claims under a will or other instrument executed by a person dying domiciled in the United Kingdom, is (in general) liable to succession duty (?).

¹ *In re Stokes*, 1890, 62 L. T. 176. This case and *Forbes v. Steven* are, semble, to be explained on the ground that *D*'s claim is a right to a share, not in land (immovable property), but in the value of the whole partnership property, which is movable property. But the cases are not quite satisfactory (compare *Nelson*, p. 380). The fact that real property held by a partnership is treated by English law as personal property does not seem to be enough to convert the proceeds of immovable property situate abroad into movable property. Whether freehold land in India held by a partnership is to be treated as movable property, and therefore to be subject to legacy duty, would seem on principle to depend upon the law of British India rather than of England (?).

² *I. e.*, Rules 3-5.

³ *Wallace v. Attorney-General*, 1865, L. R. 1 Ch. 1, with which contrast *Re Lovelace*, 1859, 4 De G. & J. 340.

This Rule is an inference from *Wallace v. Attorney-General*, 1865, L. R. 1 Ch. 1, 9, judgment of *Cranworth*, C.

⁴ L. R. 1 Ch. pp. 1, 9, judgment of *Cranworth*, C.

⁵ *In re Lovelace*, 1859, 4 De G. & J. 340. See, as to testamentary instruments in exercise of a power of appointment, Rules 185, 186, pp. 701, 702, *ante*.

⁶ *Wallace v. Attorney-General*, 1865, L. R. 1 Ch. 1; *Jeves v. Shadwell*, 1865, L. R. 1 Ch. 2. Compare remarks on this decision of *Romilly*, M. R., *Lyall v. Lyall*, 1872, L. R. 15 Eq. 1.

⁷ Compare *Wallace v. Attorney-General*, 1865, L. R. 1 Ch. 1, and *Hanson*, pp. 23, 24.

This rule seems a fair result of the general principle that property to which a person succeeds under or by virtue of British law is, if otherwise chargeable, liable to succession duty; for where a successor claims property under a will or settlement made by a person dying domiciled in the United Kingdom, he (*prima facie*, at any rate) claims under British law.

Thus if *D*, who dies domiciled in England, has, under a power of appointment conferred upon *D* by the will of *T*, an American dying domiciled in one of the United States, appointed *A* by deed to succeed to movable property, some of which is situate in England and some of which is situate in the United States, semble that on *D*'s death the whole of the property is liable to succession duty.

It is, however, possible that cases may arise where property to which a person succeeds on the death of and under an instrument executed by a person who dies domiciled in the United Kingdom may not be liable to succession duty.

"In the case," writes Mr. Hanson, "of foreign property which the owner settles by deed at a time when he is domiciled abroad, and which remains abroad, and is distributed there in accordance with the settlement, after his death, no duty is payable, notwithstanding that the settlor had, previously to the time of distribution, acquired a domicile in this country."¹ The explanation that Mr. Hanson gives is that, "by the execution of the settlement, [the owner] divested himself of his ownership, so that the property thenceforward ceased to be his, in such a sense as to follow his person; and, consequently, the situation of his domicile can have no further effect in determining the situation of any property which has thus been disposed of in his lifetime."² The supposed case is rather vaguely stated. Under the circumstances, however, which it suggests, the result probably follows that the settled property is not, on the settlor's death, liable to succession duty. The true reason of this would seem to be that, though the settlor was at his death domiciled in England, the successor's title to the property does not depend on British law. Movable property, it should be noted, to which a person succeeds under a will made by a testator domiciled in the United Kingdom, must almost always be liable to legacy duty, and therefore can rarely, if ever, be liable to succession duty.³

*Rule 5.*⁴ *The movable property, wherever situate, of a deceased person not dying domiciled in the United Kingdom, is liable to succession duty if the successor is entitled to the property under a British trust or settlement and therefore under British law.*

¹ *Hanson*, p. 24.

² *Ibid.*

³ Succession Duty Act, 1853, s. 18.

⁴ See *In re Wallop's Trusts*, 1864, 33 L. J. Ch. 351; 1 De G. J. & S. 656; *In re Lovelace*, 1859, 4 De G. & J. 340; *Attorney-General v. Campbell*, 1872, L. R. 5 H. L. 524; *In re Badart's Trusts*, 1870, L. R. 10 Eq. 288; *Lyall v. Lyall*, 1872, L. R. 15 Eq. 1; *In re Cigala's Settlement*, 1878, 7 Ch. D. 351; *Attorney-General v. Felce*, 1894, 10 Times L. R. 337. Compare *Norman*, pp. 113, 114.

This rule is a direct application of the general principle already laid down,¹ and covers at least three different cases.

First Case. — Where there is a succession to movable property situate in the United Kingdom under the will of a person domiciled out of the United Kingdom, who has a mere power under a British settlement or will of disposing of the property, the property is liable to succession duty.²

Under an English marriage settlement, money is assigned to trustees to hold upon certain trusts during the lives of *D* and *M*, and, further, on the death of the survivor, upon such trusts as *D* should by deed or will appoint. *D* and *M* are at the time of their marriage British subjects domiciled in England. After the marriage they acquire and retain till the end of their lives a domicile in France. *D* exercises by will the power of appointment in favour of *A* and *B*, French subjects domiciled in France. On the succession of *A* and *B*, the property is liable to succession duty.³

An Englishman domiciled in England has left £5,000 in the funds in trust to pay the interest to his daughter for life, and on her death to pay over the fund to such persons as she may by will appoint. *D*, the daughter, marries a person domiciled in Jersey, and herself dies there domiciled. She leaves the money in question to her husband, who, at the time of her death, is domiciled in Jersey. The £5,000 is liable to succession duty.⁴

Each of the foregoing illustrations, and the decisions on which they are based, viz., *In re Lovelace*⁵ and *In re Wallop's Trusts*⁶ respectively, rests at bottom on the same ground, viz., that the successor claims in virtue, not of a will strictly speaking, but of a testamentary appointment made under an English instrument which must necessarily be construed by English law; in other words, the successor is entitled under English law. "This decision" (viz., the decision in *Wallace v. Attorney-General*), says Lord Cranworth, "does not conflict with . . . *Re Lovelace* and *Re Wallop's Trusts*. They were both cases of testamentary appointment under English instruments, not of wills; and "such an instrument must necessarily be construed by our own laws, not by that of the domicile of the person executing the power."⁷

Second Case. — Where there is a succession to movable property bequeathed by a testator who is not domiciled in the United Kingdom, which under his will is invested by his executors in England under

¹ See pp. 785, 786, *ante*.

² *In re Wallop's Trusts*, 1864, 33 L. J. (Ch.) 351; 1 De G. J. & S. 656; *In re Lovelace*, 1859, 28 L. J. (Ch.) 489; 4 De G. & J. 340.

³ *In re Lovelace*, 1859, 28 L. J. (Ch.) 489; 4 De G. & J. 340.

⁴ See *In re Wallop's Trusts*, 1864, 33 L. J. (Ch.) 351; 1 De G. J. & S. 656.

⁵ 1859, 4 De G. & J. 340; 28 L. J. Ch. 489.

⁶ 1864, 1 De G. J. & S. 656; 33 L. J. Ch. 351.

⁷ *Wallace v. Attorney-General*, 1865, L. R. 1 Ch. 1, 9, judgment of Cranworth, C. The words I have underlined contain the gist of the whole matter. They hold good even though the cases differ in this fact, viz., that the successor in *Re Lovelace* derived his title, under the instrument creating the power, from the donor, whilst the successor in *Re Wallop's Trusts* (in virtue of the Succession Duty Act, 1853, s. 4) derived his title from the testator, i. e., the donee of the power by whom it was exercised.

certain trusts, and it subsequently devolves on successors claiming to succeed to this invested fund under the trust created by the will, the property is liable to succession duty.¹

D, an Englishman domiciled in Portugal, appoints executors, and directs them to collect his property in Portugal, pay certain legacies to *A* and others, and invest the residue in English three per cents, appropriating a part to purchasing a life annuity for *M*, which part is, on *M*'s death, to devolve on *B*. No legacy duty or succession duty is payable by *A* or *M*, but succession duty is payable by *B*.²

The difference between the position of *A* and of *B* is noticeable.

A's case falls under Rule 3,³ and not under Rule 5. He therefore pays no duty. *B*'s case falls within Rule 5. The money is invested in English funds, and, though *B*'s title originates in a will made by *D* domiciled in a foreign country, *B*'s succession to the property is a succession under English law. *B*, therefore, pays succession duty.

The position of *B* has been explained as follows:—

"In order to have the personal property administered, you must seek the forum of that country where the person whose property is in question had acquired a domicile. Then, when you obtain possession of that property, you do all which has to be done in the country to which the testator belonged. The question is afterwards, when the property has been so obtained and administered, and is in the state in which the testator desired it to be placed, in what condition do you find the fund? You find it in the condition of a settled fund. That condition arises, no doubt, from the operation of the testator's will; but I can see no difference, in consequence of that circumstance, from its having arisen in any other manner, as, for instance, from a deed executed in his lifetime, as might have been the case, or, supposing he had transmitted to his bankers a sum of money to be invested upon the same trusts. When there is any fund standing in this country in the names of trustees in consols or other property which has a *quasi* local settlement, which stock in the funds has, all the dividends having to be received in this country, and the persons who have to be dealt with in respect of it being persons residing in this country, that fund is subject to succession duty. The settlement provides for the succession, and the interest of each person on coming into possession is liable to the payment of duty upon that interest to which he so succeeds."⁴

"If a man dies domiciled abroad possessed of personal property, the question of whether he has died testate or intestate, and also all questions relating to the distribution and administration of his personal estate, belong to the judge of the domicile, and that on the principle

¹ *Attorney-General v. Campbell*, 1872, L. R. 5 H. L. 524.

² *Ibid.*

³ Compare Rule 1, p. 788, *ante*.

⁴ *Attorney-General v. Campbell*, 1872, L. R. 5 H. L. 524, 528, per *Hatherley*, Ch. How far is the case really affected by the local situation of the fund? Semble, the result would have been the same if the settled fund had been invested in French *rentes*. Compare *In re Cigala's Settlement*, 1878, 7 Ch. D. 351, and *Attorney-General v. Felce*, 1894, 10 Times L. R. 337.

"of *mobilia sequuntur personam*. His domicile sets up the forum of administration. Now, apply that to the present case. The legatees would resort to that forum to receive their legacies, and the executors and trustees, when the residue has been ascertained, would resort to that forum to receive it. When they have received it the legacy is discharged, and all things that are incidental to the legacy cease. They receive it bound with the duty of bringing it to this country and investing it here in consols, which they are directed to hold upon certain trusts mentioned by the will. But the character of the ownership is no longer that of a legacy. The character of the ownership is under the trusts directed to be created by the will. There is, therefore, a settlement made of the property which is brought into this country and invested here in such mode of investment as gives to the property whilst it remains here the character of English property in respect of locality. That settlement, so made, undoubtedly becomes subject to the rules of English law under which it is held, by virtue of which it is enjoyed, and under which it will be ultimately administered. That, therefore, is a description of ownership which falls immediately within the provisions of the Succession Duty Act."¹

D, by a marriage settlement executed in England, assigned to trustees, all domiciled and resident in England, an English policy of assurance for £2,000, and a sum of £1,000 consols, and covenanted to pay the trustees £1,000 within three years. The trustees held the trust funds upon trust to pay interest to *D*'s wife for life, upon her death to *D* for life, and upon the death of both of them to divide the funds among the children of the marriage. *D* and his wife were domiciled in New South Wales. In 1850 *D*, by his will, appointed executors in New South Wales, and directed them to collect his residuary estate and transmit it to his executors in England, who were to invest the sums transmitted in English funds, pay the income to *D*'s wife for life, and after her death to divide the capital among *D*'s children on their attaining twenty-one.

In 1853 *D* died domiciled in New South Wales, and three months afterwards his wife died, also domiciled in New South Wales. They left only one child, *A*, also domiciled in New South Wales.

It was held that *A*, *first*, was liable to succession duty on funds to which he was entitled under the settlement; *secondly*, was not liable to succession duty on the funds to which he was entitled under the will.² *A* was liable to duty for his succession under the settlement, since he succeeded to it in virtue of English law. He was not liable to duty in respect of the funds which he obtained under the will, since he succeeded to them under foreign law.

Third Case. — Where there is a succession to movable property comprised in a British settlement vested in trustees, subject to British jurisdiction and recoverable in a British court, the property is liable to succession duty.

¹ *Attorney-General v. Campbell*, 1872, L. R. 5 H. L. 524, 529, 530, per Lord Westbury. See *In re Badart's Trusts*, 1870, L. R. 10 Eq. 288.

² *Lyall v. Lyall*, 1872, L. R. 15 Eq. 1.

In 1838 *D*, an Italian domiciled in Italy, married an Englishwoman. She assigned, under the English marriage settlement, property, consisting of French *rentes* and shares in the Bank of France, to trustees, of whom three were Englishmen and one was an Italian, upon trusts (upon the death of the husband and wife) for the children of the marriage. The Italian trustee died, and an Englishman was appointed in his place. *D* and his wife continued domiciled in Italy. In 1877 *D*, who survived his wife, died, leaving two children, *A* and *B*, both domiciled Italians. It was held that succession duty was payable by *A* and *B* on all the fund coming to them under the marriage settlement.¹

D, domiciled in France,² placed securities, consisting of Italian *rentes* and United States bonds, in the hands of *N*, an Englishman living and domiciled in England, requesting him to place the securities, which are payable to bearer, in a bank in London in *N*'s own name, and also make in *N*'s own name a declaration of trust, revocable during *N*'s lifetime, to the effect that *N*, his executors and administrators, held the securities in trust to pay the interest to *D* for life, and in trust, on *D*'s death, for *A*, a Frenchwoman domiciled in France. The required declaration of trust was made by *N*. On *D*'s death the securities are claimed by *A*. On the assumption that *N*, as appears to be the case, acted merely as a trustee, and the declaration of trust was in effect made by *D*, the securities were held liable to succession duty. The reason is that the trust was an English trust, and *A* therefore claimed the property in virtue of British law.

Under the Wills Act, 1861, 24 & 25 Vict. cap. 114, a will may be valid in England though not valid by the law of the testator's domicile.³ It has, therefore, been suggested that if a British subject dies domiciled abroad, and makes a will which is valid only in virtue of the Wills Act, 1861 (*i. e.*, which owes its validity to the law of England), and his movables are either locally situate here at the time of his death, or are remitted here in accordance with his will, they may be liable to succession duty, inasmuch as the title of the persons claiming under the will depends wholly on the law of this country.⁴ This suggestion is certainly ingenious and worth consideration. The answer to it, however, would appear to be that the successor in the case supposed does not base his title wholly on the law of this country. The validity of the will as to the testator's capacity and the nature of its provisions would appear, as already pointed out,⁵ to depend on the law of the testator's domicile.

¹ *In re Cigala's Settlement*, 1878, 7 Ch. D. 351.

² See *Attorney-General v. Felce*, 1894, 10 Times L. R. 337. It seems to have been admitted that *A*'s succession must be treated as a succession to *D* and not to *N*, or, in other words, that *D* and not *N* was the predecessor.

³ See Rule 182, Exemptions 1, 2, and Rule 184, pp. 686, 690, 693, 696, *ante*.

⁴ *Hanson*, 3rd ed., p. 223.

⁵ See pp. 687, 689, *ante*.

Rules as to Estate Duty.¹

As regards the limit of taxation in respect of movable property, there exists an essential difference between legacy duty and succession duty on the one hand, and estate duty on the other.

In the case of legacy duty and succession duty the limit of taxation is, whatever be the situation of the property, fixed in accordance with one and the same principle.²

In the case of estate duty, the limit of taxation is fixed on one principle in reference to property locally situate in the United Kingdom, and on another principle with reference to property locally situate out of the United Kingdom. The incidence, that is to say, of estate duty as regards property situate in the United Kingdom is determined, as was the incidence of probate duty, by the local situation of the property. The incidence of estate duty as regards property situate out of the United Kingdom is governed by the principle which determines the incidence of legacy duty or succession duty, i. e., of that property alone being taxable which is claimed under or by virtue of British law.³

Rule 6 refers to movable property situate in the United Kingdom. Rule 7 refers to movable property situate out of the United Kingdom.

Rule 6. Movable property passing on the death of any person dying on or after the 2nd day of August, 1894 (called hereinafter the deceased), which is situate in the United Kingdom, is liable to estate duty.⁴

This Rule is not affected by the domicile of the deceased.

In order to be liable within this rule, movable property must, first, be situate in the United Kingdom, and, secondly (semble), be situate in the United Kingdom at the time when it passes, i. e., speaking generally, at the time of the death of the deceased.

Place. — The local situation of the property must, apparently, be settled in accordance with the maxims which have hitherto determined whether property is or is not so locally situate in the United Kingdom as to be liable to probate duty, or, what is at bottom the same thing, as to give the Court jurisdiction to grant letters of administration or probate.⁵ This, at least, is the inference which may fairly be drawn from the Finance Act, 1894, s. 8, sub-s. 1; and, independently of the provisions of s. 8, the conclusion suggests itself that the Courts, in default of other guidance, will determine the local situation of property, in respect of its liability to estate duty, in accordance with the rules which have guided them in determining the local situation of property in regard to its liability to probate duty. It follows, therefore, that the technical rules as to the local situation of property established by decisions or enactments having reference to

¹ I. e., Rules 6-7, *post*. See Finance Act, 1894 (57 & 58 Vict. cap. 30), ss. 1, 2.

² See p. 785, *ante*.

³ See p. 785, *ante*, and Finance Act, 1894, s. 2, sub-s. 2.

⁴ See Finance Act, 1894, ss. 1, 2.

⁵ See particularly, pp. 318-323, *ante*.

probate duty are still in force as regards estate duty, and apply whenever the duty is claimed on the ground of the deceased's property being locally situate in the United Kingdom. Hence, to give one example of my meaning, the answer to the question whether a debt due to the deceased on a bond is or is not liable to estate duty may, under conceivable circumstances, *e. g.*, where the deceased dies domiciled in a foreign country and intestate, depend on the rule that the local situation of a specialty debt is determined by the local situation of the deed under which it is due,¹ and also on the modification introduced into that rule by the Revenue Act, 1862 (25 & 26 Vict. cap. 22), s. 39.

Time. — It would appear, though this is not stated in the Act, that property, in order to be liable to estate duty in the character of property situate in the United Kingdom, must be there situate at the time when the property passes, *i. e.*, in general, at the death of the deceased. The words "in general" must be noticed, for it may sometimes happen that property which in fact passes *before* a deceased person's death is under the Finance Act, 1894, s. 2, sub-s. 1 (c), to be treated as "property passing on the death of the deceased."

Rule 7.² Movable property passing on the death of the deceased, when situate out of the United Kingdom, if under the law in force before the passing³ of the Finance Act, 1894, legacy duty or succession duty is payable in respect thereof, or would be so payable but for the relationship⁴ of the person to whom it passes, is liable to estate duty.

This is, it is submitted, the effect of the Finance Act, 1894, ss. 1 and 2. The result is arrived at as follows: Section 1 imposes estate duty on all property which passes on the death of the deceased, *i. e.*, of any person dying on or after August 2, 1894. Section 2, sub-s. 1, gives a wide extension to the term "property passing on the death of the deceased;" whilst sub-s. 2 provides that "property "passing on the death of the deceased, when situate out of the United Kingdom, shall be included [in the term 'property passing on the "death of the deceased"] *only*, if, under the law in force before the "passing of [the Finance Act, 1894], legacy or succession duty is "payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes."⁵ The language of the enactment is awkward, but its meaning is pretty clear. All property passing on the death of the deceased which is situate in the United Kingdom is liable to estate duty: but property passing on the death of the deceased which is situate out of the United Kingdom is liable to estate duty if liable to legacy duty or succession duty, and, subject to a slight reservation, not otherwise; this reservation is, that property

¹ See *Commissioner of Stamps v. Hope*, [1891] A. C. 476.

² See Finance Act, 1894, s. 2, sub-s. 2.

³ *I. e.*, 31 July, 1894.

⁴ See as to the exemption of property passing to husband or wife of deceased, from legacy duty, 55 Geo. III. cap. 184, Sched. pt. iii. (*Hanson*, p. 200), and, from succession duty, Succession Duty Act, 1853 (16 & 17 Vict. cap. 51), s. 18 (*Hanson*, p. 294, and compare generally, *Hanson*, p. 11).

⁵ Finance Act, 1894, s. 2, sub-s. 2.

out of the United Kingdom, which escapes legacy duty and succession duty only on account of the relationship of the person to whom it passes, remains liable to estate duty. Movable property, therefore, situate out of the United Kingdom is liable to estate duty if, on account of the domicile of the deceased, or from any other cause, it is liable either to legacy duty or to succession duty. In other words, movable property situate out of the United Kingdom is liable to estate duty if liable to legacy duty or succession duty under Rules 1 to 5,¹ and not otherwise; or, to put the same thing in a more general form, property which is situate out of the United Kingdom is liable to estate duty if the person to whom it passes is entitled to it, or claims it under British law; it is not liable if he is neither entitled nor claims it under British law.

If we now combine Rules 6 and 7, we shall find that the liability of property passing on the death of a deceased person to estate duty depends on one of two different things, — *first*, on the local situation of the property, i. e., on its being situate in the United Kingdom; and, *secondly*, when it is not so situate, on the successor being entitled thereto under British law.

Hence, if *D* dies intestate at Melbourne, in Victoria, leaving movable property, *e. g.*, goods, in England, in Victoria, and in France, the result as regards the liability to estate duty of the property which passes on his death is as follows: Whatever be *D*'s domicile, the English goods are liable. The liability of the Victorian and the French goods depends in effect on *D*'s domicile; if *D* dies domiciled in the United Kingdom, his Victorian and French goods are liable to legacy duty, and therefore, also, to estate duty; if *D* does not die domiciled in the United Kingdom, then his Victorian and French goods, not being liable to legacy duty nor presumably to succession duty, are not liable to estate duty. This general statement must be taken subject to two reservations.

It is possible, in the first place, that the whole or part of the Victorian or French goods may, though *D* is not domiciled in England, be liable to succession duty,² in which case they will wholly or in part be liable to estate duty.

Certain deductions from estate duty, in the second place, may be allowed in respect of death duties to which *D*'s property may be liable in France or in Victoria respectively.³

Question. — *Within what limit does estate duty fall on, or is payable in respect of, property passing before death, e. g., by gift?*⁴

Estate duty is payable, in general, only in respect of property which in fact "passes on the death" of a deceased person; but to prevent

¹ See pp. 788-790, *ante*.

² See Rule 5, p. 790, *ante*.

³ As to the deductions allowable from estate duty in respect of death duties payable on property situate (1) in a strictly foreign country, *e. g.*, France, see Finance Act, 1894, s. 7, sub-s. 4, or (2) in a British possession, *e. g.*, Victoria, see Finance Act, 1894, s. 20. As to deductions in respect of debts due from deceased, etc., see s. 7, sub-s. 1-3.

⁴ See Finance Act, 1894, s. 2, sub-s. 1 (c). Customs and Inland Revenue Act, 1881, s. 38, as amended by 52 & 53 Vict. cap. 7.

evasion of the duty, the Finance Act, 1894, in effect provides¹ that in certain cases, *e. g.*, where a person within twelve months of his death makes an out-and-out gift of his property (*e. g.*, a diamond ring), the property shall be considered, as regards liability to estate duty, as "passing on his death." Hence estate duty is in reality in these instances payable in respect of property which passes before a deceased person's death.

Within what limits, however, are the provisions of the Finance Act, as to property thus passing before a person's death, *e. g.*, by gift, meant to operate? Do they affect the property of all persons who leave behind them personal estate situate in the United Kingdom? Do they affect property which is situate out of the United Kingdom at the time when the transaction, *e. g.*, the gift, by which it is transferred, takes place? These and the like inquiries do not admit of a decisive answer. A conjectural reply to them must be found by keeping in mind the following considerations. The property, in the first place, which passes, *e. g.*, a diamond ring given by *D* to *A* within a week of *D*'s death, in fact, before, but, as regards liability to estate duty, on the death of a deceased person, must be dealt with exactly as though it actually passed on the deceased's death. The Finance Act, in the second place, whilst, in the cases under consideration, it treats property as passing on the death of the deceased, though in fact it pass to another before his death, does not in any way affect the local situation of such property either when it passes or at the time of the deceased's death. In the last place, an enactment intended to guard against the evasion of estate duty can hardly apply to any person who, at the time of the transaction, *e. g.*, the gift, by which his property passes, is neither by his own domicile or residence or presence in the United Kingdom, nor by the fact of the property itself being in the United Kingdom, subject to British law.

The questions which may arise, and the probable answers thereto, may best be understood from an examination of some imaginary cases.

In each of these cases, *D* has within a week of his death made an out-and-out gift to *A* of a diamond ring worth £1,000 by handing it to *A*, and has subsequently died intestate, leaving a large amount of property in the United Kingdom. The point to be determined in each instance is whether estate duty is payable in respect of the diamond ring. The decision thereof depends on the correct interpretation of the Finance Act, 1894, ss. 1 and 2, and especially of s. 2, sub-s. 1 (c), with which must be read the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. cap. 12), s. 38.

Case 1.—*D*, both at the time of making the gift and at the time of his death, is domiciled in the United Kingdom. The ring is in England at the time of the gift and at the time of *D*'s death.

Estate duty is payable. The ring, in fact, no doubt passed to *A* before *D*'s death, but, as regards the liability of *D*'s estate to estate duty, must be treated as passing on *D*'s death.

¹ Sect. 2, sub-s. 1 (c).

Case 2. — *D* is a Frenchman domiciled in France, as also is *A*. The gift takes place at Paris, but before *D*'s death *A* comes to England, and the ring is in England at the time of *D*'s death.

Semble, estate duty is *not* payable. *D* being a Frenchman domiciled in France at the time when the gift takes place, the whole transaction is a French transaction, and probably falls wholly outside the Finance Act, 1894, ss. 1 and 2, or, in other words, *D* is in respect of this gift to be treated as a person not subject to British law.

Still this conclusion is, it is submitted, by no means certain. The case comes within the words of the sections imposing the duty. At the time of *D*'s death, the ring is, as a matter of fact, situate in England. It is to be treated, if the Act applies to the case at all, as passing on *D*'s death.¹ The property passing, therefore, *i. e.*, the ring, comes within the Finance Act, 1894, s. 2, sub-s. 1, which governs property situate in the United Kingdom, and does not come within the Finance Act, 1894, s. 2, sub-s. 2, which refers only to property passing on the death of the deceased when situate out of the United Kingdom.

Case 3. — *D* is a Frenchman domiciled in France. He gives the ring to *A*, another Frenchman, also domiciled in France, whilst they are both staying for a day or two in England. The ring is in England at the time of *D*'s death.

Estate duty, it would seem, is payable.

Case 4. — The circumstances are the same as in Case 3, except that the ring is in France at the time of *D*'s death.

Estate duty is (semble) not payable. The ring is not situate in England at the time of *D*'s death, and if it can be treated, under the Finance Act, 1894, s. 2, sub-s. 1 (c), as property passing on *D*'s death, it still must be considered as property passing when situate out of the United Kingdom, but it would not, even had it passed as a legacy, have been liable to legacy or succession duty. The ring, therefore, it is submitted, is in no point of view chargeable with estate duty.

These illustrations apply directly only to the case of a gift made by a person within twelve months of his death. They suggest, however, the kind of problems which may be raised as to the limit within which the Finance Act, 1894, s. 2, sub-s. 1 (c), affects property within its scope.

(B) *Duties of Income Tax.*

Income tax, in so far as it is chargeable on movable property, is imposed under or in accordance with Schedules (C)², (D),³ and (E),⁴ and is in effect a tax on annual profits or gains, *i. e.*, income, derived from various sources, *e. g.*, from public revenues, from property⁵ or

¹ See Finance Act, 1894, s. 2, sub-s. 1 (c), and Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2 (a).

² Income Tax Act, 1853 (16 & 17 Vict. cap. 34), s. 2, and Income Tax Act, 1842 (5 & 6 Vict. cap. 35), ss. 88-99.

³ Income Tax Act, 1853, s. 2, and Income Tax Act, 1842, ss. 100-102.

⁴ Income Tax Act, 1853, s. 2, and Income Tax Act, 1842, s. 146.

⁵ Income Tax Act, 1853, s. 2, Sched. (C).

possessions, from interest,¹ from public offices of profit, etc.² With most of the questions which arise under these schedules, this Note has no concern whatever. Its aim, as far as it is concerned with income tax, is to establish from the Income Tax Acts as interpreted by judicial decisions, that the limit of taxation in regard to incomes is in reality fixed, in the main at any rate, by three principles, which may be thus broadly summed up: *first*, income tax is payable on any income arising from a British source; *secondly*, income tax is payable on any income which, though not arising from a British source, is the income of any person resident in the United Kingdom, and is actually received in the United Kingdom; *thirdly*, income tax is, in general, not payable on any income which is not taxable under one or other of the two foregoing principles. No one of these three principles is, it must be admitted, expressed in so many words in the Income Tax Acts, nor even in the judgments interpreting these Acts. The method by which it is attempted to establish in this Note that these principles, in fact, fix the limit of taxation under Schedules (C), (D), and (E) is first to state each principle with sufficient accuracy for our purpose, and then to show how it applies to taxation under each of these schedules. It will be found convenient to deviate a little from the arrangement of the Income Tax Acts, and to apply each principle first to Schedule (D), which is the main or leading schedule of charge, and secondly to Schedules (C) and (E) respectively, which are little more than supplementary schedules.

First Principle. — *Income tax is payable on any income arising or accruing to any person whomsoever, from a British³ source.*

An income arises from a British source which is derived from property or possessions in the United Kingdom, from a trade or possession carried on in the United Kingdom, from payments out of the public revenue of the United Kingdom, and the like, or, to put the matter very generally, but, it is conceived, accurately, an income arises from a British source when either it arises from property or possessions in the United Kingdom, or it results (*e. g.*, in the case of a trade) from acts done in the United Kingdom.

This principle holds good as regards income coming under any of the Schedules (D), (C), or (E). Its application, moreover, does not depend on the nationality or domicil, or even the residence, of the person to whom the income is payable or accrues. Whether, indeed, an income is derived from a British source, *e. g.*, whether the trade from which a man makes an annual profit is or is not carried on in the United Kingdom, may to a certain extent depend upon his residence;⁴ but when once it is established that an income is derived from a British source, then income tax is payable in respect thereof, whether the person to whom the income accrues be resident in England, France, or Victoria.

¹ Income Tax Act, 1853, s. 2, Sched. (D).

² *Ibid.*, Sched. (E).

³ For meaning of "British," see p. 783, note 6, *ante*.

⁴ *Cesena Sulphur Co. v. Nicholson*, 1876, 1 Ex. D. 428; *San Paulo Ry. Co. v. Carter*, [1896] A. C. 31.

As to Schedule (D). — Under this schedule the tax is imposed upon annual profits or gains, i. e., income, of the following descriptions.

(i) *Income arising or accruing to any person from property situate in the United Kingdom.*¹

The income arising from such property is clearly income arising from a British source, and therefore properly taxable within our first principle.

(ii) *Income arising from any profession, trade, employment, or vocation carried on, or exercised within, the United Kingdom.*²

The meaning of this head of charge, as interpreted by the Courts, would be clearer were it expressed as a charge on income arising, not from "any profession, trade, etc., carried on or exercised in the United Kingdom," but from "the carrying on or exercise of any profession, trade, etc., in the United Kingdom." The difference may seem verbal, but is real. The words used in Schedule (D) suggest that if any trade is in part carried on or exercised in the United Kingdom (e. g., if champagne is sold by a French wine merchant in England), the whole profits of the trade are taxable; whereas, if the language of the schedule were altered as suggested, it would be plain that, as is the fact, those profits only of a trade carried on, e. g., by a French wine merchant, in the United Kingdom, are taxable, which result from its being carried on in the United Kingdom. When the meaning of this head of charge is fully understood, it is obvious that the income which accrues to any person, whatever be his nationality or residence, from the carrying on or exercise of a trade within the United Kingdom, is income arising from a British source, and is therefore liable to taxation within our general principle. The true difficulty — and it is a matter which has exercised the ingenuity of the Courts — is to determine whether a profession, trade, etc., is or is not "*carried on or exercised within the United Kingdom.*" For the sake of sim-

¹ Compare Sched. (D), paragraphs 1 and 2, from which it is clear that income derived from property in the United Kingdom is taxable whatever be the residence of the person to whom the income accrues.

² Compare carefully Sched. (D), paragraphs 1 and 2. Under paragraph 1, income tax is charged "for and in respect of the annual profits or gains [income] arising "or accruing to any person residing in the United Kingdom from any kind of property "whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains [income] arising or accruing to any person residing in the United Kingdom, from any profession, trade, employment, or vocation, "whether the same shall be respectively carried on in the United Kingdom or elsewhere."

Under paragraph 2, income tax is charged "for and in respect of the annual profits or gains [income] arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any "property whatever in the United Kingdom, or any profession, trade, employment, "or vocation exercised within the United Kingdom."

Hence it follows that —

Income tax is charged in respect of income arising or accruing to any person, whether residing in the United Kingdom (Sched. (D), paragraph 1), or not residing in the United Kingdom (Sched. (D), paragraph 2), from —

(1) any property situate in the United Kingdom (Sched. (D), paragraphs 1 and 2), and
(2) any profession, trade, etc., carried on (Sched. (D), paragraph 1) or exercised (Sched. (D), paragraph 2) in the United Kingdom.

plifying the question, let our attention be confined to the case of a "trade" which clearly includes what is now more ordinarily called a business.

What may be the difference (if any) between a trade which is "exercised" and a trade which is "carried on" in the United Kingdom has not been judicially determined, and is not, perhaps, a matter of great importance. It may be laid down with some confidence that, whatever the word "exercised" may mean, it certainly includes "carrying on," and therefore that every trade which is carried on in the United Kingdom is also exercised there.¹

What is of importance is, that, taking the decisions of the Courts as they now stand, a trade may clearly be carried on or exercised in the United Kingdom in two different cases : —

First Case. — A trade or business is "carried on" in the United Kingdom when the ultimate management, or the centre and control of the business, as it is sometimes expressed, is placed in the United Kingdom,² or, in other words, when the management of the business as a whole is placed in the hands of persons who reside, or have their head office, in the United Kingdom.

When this is the case, the whole business is carried on in the United Kingdom, even though the transactions (*e. g.*, sales) from which profits arise take place mainly, or wholly, in a foreign country, by which, of course, is here meant any country not forming part of the United Kingdom.

X & Co., an English company with their head office in England, undertake in England for the carriage of goods abroad as part of their ordinary business. The whole of the carriage is done abroad. The company, nevertheless, carry on trade in the United Kingdom.³

X & Co., a company incorporated under the Companies Acts, 1862–1867, work sulphur mines in Italy, and are afterwards registered in Italy. There is a board of directors in England, and the general business of the company is wholly under the management of this board. The manufacture and sale of sulphur takes place wholly in Italy, and the profits of the company (if any) are made in Italy. The company reside in the United Kingdom. The whole business of the company is carried on in the United Kingdom.⁴

X & Co. are incorporated under an English Act. The offices of *X & Co.* are in London, and the meetings of the directors take place there. *X & Co.* make their gains from gas-works in foreign countries, where alone profits (if any) are made. The company reside in the United Kingdom. Their whole business is carried on in the United Kingdom.⁵

¹ *Ericson v. Last*, 1881, 8 Q. B. D. (C. A.) 414, 415, judgment of Jessell, M. R.

² See especially, *Cesena Sulphur Co. v. Nicholson*, 1876, 1 Ex. D. 428, 452, 454, judgment of Huddleston, B.; *Imperial Continental Gas Association v. Nicholson*, 1877, 37 L. T. 717; *London Bank of Mexico v. Aphorpe*, [1891] 2 Q. B. (C. A.) 378; *San Paulo Ry. Co. v. Carter*, [1895] 1 Q. B. (C. A.) 580; [1896] A. C. 31.

³ See *Ericson v. Last*, 1881, 8 Q. B. D. (C. A.) 414, 417, illustration suggested in judgment of Jessell, M. R.

⁴ *Cesena Sulphur Co. v. Nicholson*, 1876, 1 Ex. D. 428. Compare *Calcutta Jute Co. v. Nicholson*, 1876, 1 Ex. D. 428.

⁵ *Imperial Continental Gas Association v. Nicholson*, 1877, 37 L. T. 717.

X & Co., a company registered under the Joint Stock Companies Acts, carry on business in London as bankers, with branches in foreign countries. The directors and shareholders meet at the head office in London, whence the affairs of *X & Co.* are directed and managed. A large portion of the profits arise from transactions in Mexico. The business is one business, and that business is carried on in the United Kingdom.¹ "They have," says Lord Esher, "only one business, which they carry on in England. It is true that part of the profits of that business carried on in England is earned by means of transactions abroad, but that is not [for income-tax purposes] carrying on the business abroad; it is carrying on the business in England by means of some transactions of it which are carried out abroad."²

X & Co., a company registered under the Companies Acts, whose registered office is in London, are proprietors of a railway in Brazil. The working of the railway is under the control and direction of, and the business of *X & Co.* is managed by, directors in London, who send out from London the materials and plant necessary for the purpose of the railway. The business is carried on in the United Kingdom.³

"It has been repeatedly said during the argument by the counsel for the appellants [*i. e.*, *X & Co.*] that the question is where the profits are earned, meaning thereby really where they are received. The profits are earned by the whole operation of carrying on the trade; and, moreover, the material question under the words of the statute is, not where the profits are earned, but where the trade is carried on. It was argued that, where the master of a business resident in England determines in this country what steps are to be taken in the conduct of the business, what contracts are to be made and the terms of them, yet, if the contracts are to be carried out abroad, the direction and management of the business in England forms no part of the business by which the profits are earned. But it is obvious that, if the master of such a business makes injudicious contracts, he will not get any profits, whereas, if he makes judicious contracts, he will. It was said that, if the master of a business resident in England buys in this country the materials necessary for carrying on the business, but they are not worked up here, no part of the business by which the profits are earned is carried on in England. These appear to me to be obvious fallacies to which the counsel for [*X & Co.*] were driven by the stress of the case. The purchase of materials is in most trades a most essential part of the business."⁴

These words of Lord Esher's contain the gist of the whole matter. When the conduct of a business is finally directed and controlled in the United Kingdom, it is, whatever be the country wherein the trans-

¹ *London Bank of Mexico v. Aphorpe*, [1891] 2 Q. B. (C. A.) 378.

² *Ibid.*, p. 382, judgment of Esher, M. R., and compare p. 384, judgment of Kay, L. J.

³ *San Paulo Ry. Co. v. Carter*, [1896] A. C. 31.

⁴ *San Paulo Ry. Co. v. Carter*, [1895] 1 Q. B. (C. A.) 580, 586, 587, judgment of Esher, M. R. Compare [1896] A. C. 31, 38, 39, judgment of Halsbury, C., and pp. 42, 43, judgment of Lord Davey.

actions (*e. g.*, the sales) from which profits are earned take place, wholly carried on in the United Kingdom. Hence it follows that the whole of the profits of the business arise from a trade carried on in the United Kingdom, and the whole of them are liable to income tax. It is true that a trade can hardly in this sense be carried on in the United Kingdom unless the person, *e. g.*, the corporation, managing the business, is resident in the United Kingdom. But the liability to income tax does not in this instance really depend on the residence of the person to whom the profits accrue, but on the fact that the whole annual profits arise from a business carried on in the United Kingdom.¹

In the earlier cases it is apparently assumed by the judges that where a person resided in the United Kingdom he was, *from the mere fact of his residence there*, liable to pay income tax on the whole of the profits accruing to him from a trade carried on in the United Kingdom or elsewhere. This interpretation of the first paragraph of Schedule (D) is now shown to be erroneous by *Colquhoun v. Brooks*, 1889, 14 App. Cas. 493. The matter really stands thus: When a trade is carried on in the United Kingdom, the whole of the profits derived from the trade there carried on are liable to income tax, and in many, or in most instances a trade, from which a person who resides in the United Kingdom derives profits, is, from the fact of his residing and managing the business in the United Kingdom, wholly carried on there; but circumstances may occur under which a person who resides in the United Kingdom derives profits from a trade carried on in a foreign country, in which case it does not follow that the whole profits of the trade are taxable. Under the head of charge, in short, which we are considering, though a person's residence may be proof that a trade is carried on in the United Kingdom, it is not his residence in the United Kingdom, but the fact of the trade being carried on there, which imposes liability to income tax.

Second Case. — A trade or business is carried on or exercised in the United Kingdom when, or in as far as, the transactions by which profits are earned take place in the United Kingdom.²

This holds, even though the ultimate management, or the central point of the trade or business, is placed in a foreign country.

In the decisions having reference to this particular point, the word "exercised" is more often used than "carried on." There is probably, as already pointed out,³ no substantial distinction between the two terms. The reason why the word "exercised" is generally employed by the judges with regard to a trade, the central seat of which is not in the United Kingdom, is that the cases with reference to such a trade arise where the trader is not resident in the United

¹ Contrast *San Paulo Ry. Co. v. Carter*, [1895] 1 Q. B. (C. A.) 580; [1896] A. C. 31, and *London Bank of Mexico v. Apthorpe*, [1891] 2 Q. B. (C. A.) 378, on the one hand, with *Attorney-General v. Alexander*, 1874, L. R. 10 Ex. 20, and *Bartholomay Brewing Co. v. Wyatt and Nobel Dynamite Co. v. Wyatt*, [1893] 2 Q. B. 499, on the other.

² *Tischler v. Apthorpe*, 1885, 52 L. T. n. s. 814; *Pommery v. Apthorpe*, 1886, 56 L. J. Q. B. D. 155; *Werle v. Colquhoun*, 1888, 20 Q. B. D. (C. A.) 753.

³ See p. 802, *ante*.

Kingdom, and therefore fall within the terms of the second paragraph of Schedule (D), which refers to profits accruing to persons not resident in the United Kingdom, and in which the word "exercised" is used instead of "carried on."

X & Y are a French firm of wine-growers and merchants carrying on business at Bourdeaux, where they reside. *X & Y* consign wine to their English customers, and sometimes to *N*, an agent in England, who receives payment for all the wine sold in England. *X & Y* have an office in England. *X & Y* exercise a trade in the United Kingdom.¹

X & Y, French wine merchants, have a chief office in France, where they reside. They have never been resident in England. They employ an agent in England, who receives orders from customers in England, and collects payments for wine sold there. The wine is supplied either from a stock kept in England, or if the order be large, *X & Y* ship the wine from France direct to the customer. *X & Y* exercise the trade of wine merchants in the United Kingdom.²

X & Y are a firm of French wine merchants domiciled and resident in France, and employ a London agent to obtain orders for their wine in England. The wine is advertised in England. The name of *X & Y* is put up at the business premises of their London agent. *X & Y* keep no wine in England. All orders are forwarded to them in France, and the wine is sent by *X & Y* thence direct to the English customer at his expense and risk. Payments are made either directly to *X & Y*, or to their London agent. Receipts are sent to the customer by *X & Y*. The London agent has a commission on the wines sold, but *X & Y* alone are interested in the gain or loss on the sales. *X* and *Y* exercise a trade in the United Kingdom.³

X & Y are a foreign telegraph company domiciled at Copenhagen. They possess marine cables from Denmark, which are in connection with Aberdeen and Newcastle, and which communicate with the telegraph lines of the Post-office in the United Kingdom. They have work-rooms and clerks in London and elsewhere in the United Kingdom. Messages from the United Kingdom are forwarded by *X & Y* to Denmark. The charges for such messages are collected by the Post-office, and after the sums due to the Post-office are deducted, paid to *X & Y*. *X & Y* exercise a trade in the United Kingdom.⁴

A trade may then, in two different cases, be carried on or exercised in the United Kingdom, or, to put the same thing in other words, the expression carried on or exercised in Schedule (D) has two different senses. When, however, a trade is so carried on or exercised, the whole of the profits accruing to any person from its carrying on, or exercise, in the United Kingdom are taxable. No doubt the amount of the profits or income taxable in the first case differs from the amount taxable in the second case; for, when a trade comes within the first case, the whole profits thereof, whether made in the United Kingdom

¹ *Tischler v. Aphorpe*, 1885, 52 L. T. N. S. 814.

² *Pomerry v. Aphorpe*, 1886, 56 L. J. Q. B. D. 155.

³ *Werle v. Colquhoun*, 1888, 20 Q. B. D. (C. A.) 753; *Grainger v. Gough*, [1895] 1 Q. B. (C. A.) 71.

⁴ *Ericson v. Last*, 1881, 8 Q. B. D. (C. A.) 414.

or elsewhere, are liable to income tax, whilst, when a trade comes within the second case, that part only of the profits is liable to income tax which results from transactions taking place in England. But we have, after all, here, not a difference of principle, but an application of one and the same principle to different circumstances. In the first case, a trade is finally managed and controlled in the United Kingdom; hence the whole trade, whatever be the country in which the profits are made, is carried on in the United Kingdom. The whole of the profits result from this carrying on, and therefore are taxable as profits of a trade carried on in the United Kingdom, *i. e.*, as income arising from a British source. In the second case, the trade is finally managed and controlled abroad, though a certain part of it is carried on or exercised in the United Kingdom. The whole of the profits resulting from this part of the trade, *i. e.*, all the profits which result from the trade being carried on or exercised in the United Kingdom, are taxable. And here, again, all the income is taxable which arises from a British source.

This statement of the law rests, be it remembered, on the cases as they at present stand. A point which has never been fully considered by the House of Lords still remains open to doubt. Are the Courts justified in giving, as in effect they do give, two different senses to the one term "carried on" or "exercised"? Are they right in holding, that is to say, that (1) a trade of which all the gains result from transactions in France is wholly exercised or carried on in the United Kingdom because it is ultimately managed by a trader living in London, and (2) that a trade of which part of the profits arise from transactions partially taking place in England is, in part at any rate, a trade exercised in the United Kingdom, even though it is ultimately managed by a French trader living at Paris? It is, at least, arguable that the trade should be held to be carried on or exercised *either* in the country where it is finally managed, *or* in the country where gainful transactions take place, but that it cannot be held to be carried on or exercised in each country. It is, in short, questionable whether a case such as the *San Paulo Ry. Co. v. Carter*¹ is not in principle inconsistent with a case such as *Werle v. Colquhoun*.²

(iii) *All interest³ of money annuities and other annual profits or gains not charged under any other of the schedules.*⁴

Interest is certainly made taxable as such, *i. e.*, as a separate head of charge. It is difficult from the Income Tax Acts, or the decisions thereon, to infer with certainty what as to "interest" is the exact limit of taxation. But it may safely be concluded that interest, or annual payments of the nature of interest, payable by any person in the United Kingdom to any person in or out of the United Kingdom,

¹ [1896] A. C. 31. See also, *London Bank of Mexico v. Aphorpe*, [1891] 2 Q. B. (C. A.) 378. I have assumed there is no essential difference between "carrying on" and "exercising" a trade.

² 1888, 20 Q. B. D. (C. A.) 753.

³ Sched. (D), 3rd paragraph.

⁴ Compare Income Tax Act, 1842, s. 102 (*Dowell*, 4th ed., p. 144), and Income Tax Act, 1853, s. 40 (*Dowell*, p. 272).

are chargeable,¹ i. e., that income from interest is chargeable which arises from a British source.

As to Schedule (C). — Under this schedule income tax is imposed on income arising from public annuities, that is, interest or annuities payable to any person out of any public revenue, whether it be the public revenue of the United Kingdom or of any other country, provided that such public annuities are payable in the United Kingdom.² Now, whatever be the meaning of "payable in the United Kingdom," a point which will subsequently be considered, it may be assumed that payments out of the public revenue of the United Kingdom, such, e. g., as payments to fund-holders of interest on the British National Debt, are "payable in the United Kingdom," and hence liable to income tax, and such payments constitute income arising from a British source.

As to Schedule (E). — Under this schedule are taxed the emoluments of any public office, and pensions, etc., payable by the Crown, or out of the public revenue of the United Kingdom. As the public offices, etc., referred to are pretty clearly public offices in the United Kingdom, and the pensions, etc., are paid in substance out of the revenue of the United Kingdom,³ we have here again income which is taxed as arising from a British source.

Second Principle. — *Income tax is payable on income from any foreign source arising or accruing to any person residing in the United Kingdom.*⁴

*But the tax payable in respect of such income is to be computed only on the full amount of the actual sums annually received in the United Kingdom.*⁵

As to the principle itself, three points are to be noticed: —

(1) *Foreign source.* — Our second principle applies to incomes arising from a foreign source. It does not apply to incomes arising from

¹ See Income Tax Act, 1842, s. 102. Compare *Alexandria Water Co. v. Musgrave*, 1883, 11 Q. B. D. (C. A.) 174. From the later cases, e. g., *London Bank of Mexico v. Apthorpe*, [1891] 2 Q. B. (C. A.) 378; *San Paulo Ry. Co. v. Carter*, [1895] 1 Q. B. (C. A.) 580; [1896] A. C. 31, it may be inferred that the Alexandria Water Company, which admittedly resided in England, managed its business there, and therefore carried on the whole business in the United Kingdom. It therefore is a case of a charge in respect of interest paid to persons out of the United Kingdom, by a person living in the United Kingdom, from a British source.

² Compare Income Tax Act, 1853, s. 2, Sched. (C), and s. 5, with Income Tax Act, 1842, s. 88.

³ See Income Tax Act, 1853, ss. 2, 5, and compare Income Tax Act, 1842, s. 146, which contains rules for charging duty under Sched. (E), and especially 3rd Rule.

⁴ See Sched. (D), 1st paragraph, and Sched. (C), taken together with Income Tax Act, 1842, s. 88.

See Sched. (D), 1st paragraph (*Dowell*, 4th ed., pp. 242-246), and Income Tax Act, 1842, s. 100, Fourth Case and Fifth Case (*Dowell*, pp. 140-142). Compare especially, *Colquhoun v. Brooks*, 1889, 14 App. Cas. 493, and *Bartholomay Brewing Co. v. Wyatt*; *Nobel Dynamite Co. v. Wyatt*, [1893] 2 Q. B. 499.

⁵ See Sched. (C) (*Dowell*, p. 241), and Income Tax Act, 1842, s. 88 (*Dowell*, p. 110). This proviso, it is believed, gives in substance the effect of the Income Tax Act, 1842, s. 100, Fourth Case and Fifth Case; but the words of the enactment (which are obscure) must be carefully read in connection with the decisions thereon.

a British source; these come within and are governed by our first principle. Our second principle, be it noted, is stated in an affirmative form, and does not positively exclude the taxability of incomes from a foreign source, which may not come precisely within its terms.¹ An income arising from a foreign source must, speaking generally, arise from foreign securities, under which word may perhaps be included the public revenues of foreign states,² or from property or possessions in a foreign country, under which term are to be included profits made in a foreign country by a trade or business, in so far as it is carried on there. The point of difficulty is to determine whether a trade or business is carried on in a foreign country or not; all that can be laid down is, that a trade, etc., is carried on in a foreign country, or, in other words, not in the United Kingdom, in so far as it does not come within either of the cases in which a trade is carried on or exercised in the United Kingdom.³

(2) *Person residing in the United Kingdom.* — This term, which is taken from Schedule (D), is nowhere defined in the Income Tax Acts. "Residing," however, does not mean "domiciled."⁴ What little light is to be gained as to the meaning under the Income Tax Acts of "residence" in the United Kingdom, or of "residing in" the United Kingdom, must be drawn from the Income Tax Act, 1842, s. 39. This enactment refers only to Schedule (D), and the part of it which is, for our present purpose, material, runs, as amended by the Income Tax Act, 1853, as follows: —

"No person who shall . . . actually be in the United Kingdom "for "some temporary purpose only, and not with any view or intent of "establishing his residence therein, and who shall not actually have "resided in the United Kingdom at one or several times for a period "equal in the whole to six months in any one year, shall be charged "with the . . . duties mentioned in Schedule (D) as a person residing in the United Kingdom, in respect of the profits or gains received "from or out of any possessions in any . . . of her Majesty's dominions, or any foreign possessions, or from securities in . . . any . . . "of her Majesty's dominions, or foreign securities; but, nevertheless, "every such person shall, after such residence in the United Kingdom "for such space of time as aforesaid, be chargeable to the said duties "for the year commencing on the sixth day of April preceding."⁵

These words are ambiguous. They may mean that no one is to be treated as a person residing within the United Kingdom so as to be chargeable as such, under Schedule (D), who *both* is in the United Kingdom for a temporary purpose only, *and* has not actually resided there for six months, and this is, perhaps, grammatically and legally, the right interpretation of the enactment; the result, however, would follow that a man who is in the United Kingdom with the fixed pur-

¹ See Third Principle, *post*.

² Sched. (C).

³ See pp. 801-806, *ante*. Of course the remarks applicable to a trade apply also to a profession, employment, or vocation. See Sched. (D).

⁴ *Attorney-General v. Coote*, 1817, 4 Price, 183; 18 R. R. 692.

⁵ Income Tax Act, 1842, s. 39 (part); *Dowell*, pp. 32, 33.

pose of settling there, but has actually resided there only for a week, and also a man who is in the United Kingdom for a temporary purpose only, *e. g.*, the prosecution of a lawsuit, but has resided there for seven months in one year, are each chargeable with income tax under Schedule (D) as a person residing in the United Kingdom. The enactment may, on the other hand, mean that no man is chargeable with income tax as a person residing in the United Kingdom who *either* is in the United Kingdom for a temporary purpose only, *or* who, though in the United Kingdom with a view to establishing his residence there, has not resided there for six months in any one year. From this interpretation the result, however, would follow that a man who is in the United Kingdom with the fixed purpose of establishing his residence there, but who has not resided in the United Kingdom for the whole of six months in one year, and a man who is in the United Kingdom for a temporary purpose only, *e. g.*, the prosecution of a lawsuit, but has resided there for, say, two years, are neither of them chargeable with income tax under Schedule (D) as a person residing in the United Kingdom. The residence of a corporation is apparently the country where it has its head office, or perhaps better, the country where it has the centre of its business.¹

(3) *Amount*. — The amount on which income tax is chargeable under the second principle is not the amount of the profits or income accruing from property or possessions abroad to a person resident in the United Kingdom, but the part of such profits or income which is annually or during the year received in the United Kingdom. The ground, in short, of the second principle seems to be that a person who resides in the United Kingdom, and is therefore, to a certain extent, permanently protected by its laws, is properly taxable as regards property which is received as income in the United Kingdom. There may occasionally be difficulties in determining how far profits or income are in fact received in the United Kingdom.² Whether it is so received is in each case to be determined as a matter of fact.

As to Schedule (D). — Our second principle applies to every kind of income from a foreign source which comes within Schedule (D). The language, it is true, of Schedule (D), and especially of paragraph 3, as to interest, is not clear, but the general effect of the schedule, combined with the rules contained in the Income Tax Act, 1842, s. 100, apparently is that all annual profits or gains coming within Schedule (D) which accrue to a person resident in the United Kingdom are chargeable with income tax up to the amount of the actual sums annually received in the United Kingdom. This clearly is so as regards interest from securities in foreign countries,³ and also as regards profits from foreign possessions,⁴ which term is of the very widest description, and covers everything which a man can possess in

¹ See *Domicil of Corporations*, Rule 19, p. 154, *ante*.

² *Scottish Mortgage Co. of New Mexico v. McKelvie*, 1886, 24 Sc. L. R. 87.

³ Income Tax Act, 1842, s. 100, Fourth Case.

⁴ *Ibid.*, Fifth Case.

a foreign country;¹ it certainly includes profits derived from a trade carried on wholly abroad.²

As to Schedule (C). — Our second principle seems at first sight hardly applicable to an income under Schedule (C); neither the schedule itself nor the rules for assessing duties under it provide that the income chargeable must accrue to a person who resides in the United Kingdom, or that the tax shall be charged only on the amount actually received in the United Kingdom. Yet it will be found that the second principle is, in substance, applicable to public annuities, paid out of the public revenue of a foreign country, *e. g.*, France. Such public annuities are chargeable with income tax if "payable in the United Kingdom out of any public revenue in the United Kingdom or elsewhere," *e. g.*, in France. Now "annuities payable in the United Kingdom," though the expression is rather vague,³ apparently means annuities of which a person can obtain payment in the United Kingdom, or the payment of which in the United Kingdom is provided for by the state, *e. g.*, France, paying the annuities, or is intrusted to agents in the United Kingdom of such government.⁴ But the moneys provided for payment in the United Kingdom, *e. g.*, of interest due to holders in the United Kingdom of French funds, are in effect received in the United Kingdom. It is, therefore, the amount received in the United Kingdom which in substance is taxed. Again, though nothing is said about the necessity of the person to whom the public annuities are due being resident in the United Kingdom, and the tax is, in the first instance, levied upon the agent in the United Kingdom intrusted with payment thereof,⁵ yet in the vast majority of instances the payments made, or, in other words, the annuities payable to holders in the United Kingdom, *e. g.*, of French funds, are payments to persons resident in the United Kingdom. Our second principle, moreover, as already pointed out,⁶ is simply affirmative, and it is certainly true that moneys received or held in the United Kingdom for payment of interest due to French fund-holders resident in the United Kingdom are chargeable with income tax. And such moneys clearly constitute an income which, while within Schedule (C), is chargeable under our second principle.⁷

Third Principle. — *Income tax is not in general payable in respect of any income which is not chargeable therewith under one of the two preceding principles.*

This third principle certainly holds good generally, if not invariably. Its application may be seen from the following illustrations: —

1. *X*, residing in England, is a sleeping partner in a business wholly carried on by *Y & Z* in Australia. *X*'s share in the profits,

¹ *Colquhoun v. Brooks*, 1889, 14 App. Cas. 493.

² *Ibid.*

³ Compare, for similar words, the Stamp Act, 1891 (54 & 55 Vict. cap. 39), s. 82 (b) (iii).

⁴ Compare 5 & 6 Vict. cap. 80.

⁵ *Ibid.*

⁶ See p. 808, *ante*.

⁷ As to Schedule (E) nothing need be here said, as all incomes taxable under that schedule must apparently arise from a British source.

or, in other words, income from the business, is not remitted to the United Kingdom, but is by his instructions every year invested in the purchase of land in Australia. Income tax is not payable thereon.¹

2. *X & Co.* are an English company registered under the Companies Acts and resident in England. *X & Co.* are possessed of breweries in the United States, which are placed in the hands of an American company, by whom the whole business is managed in trust for *X & Co.* *X & Co.*'s shareholders live partly in America and partly in England. The profits of the breweries are made wholly in the United States. Half of the profits are yearly remitted to the United Kingdom for payment of dividends to British shareholders. On this half income tax is chargeable under our second principle. The other half is used for payment of dividends due to American shareholders, and is never remitted to the United Kingdom. On this half income tax (semble) is not payable.²

3. *X & Co.* are an English company resident in England, and registered under the Companies Acts. Their business is to acquire shares in various German companies trading in explosives in Germany. A large number of *X & Co.*'s shares are held by Germans residing in Germany. The affairs of *X & Co.* are managed wholly by English directors, but *X & Co.* do not sell materials or carry on a manufacturing business in England or elsewhere. By the direction of *X & Co.*, the dividends due to *X & Co.* from shares in German companies are employed in paying the dividends due to *X & Co.*'s shareholders in Germany, and are never remitted to the United Kingdom. On such dividends income tax (semble) is not payable.³

4. *X* is an American staying in England for a month or two for the transaction of business, but with no intention of residing there. A large part of his income from investments in America is remitted to him in England. Income tax is not payable thereon.⁴

5. *X* is an Englishman resident in England. He owns shares in French railways. The interest on the shares, amounting to £10,000 a year, is received by himself every year at Paris, and there spent or invested in French investments. Income tax is not (semble) payable in respect thereof.⁵

6. The circumstances are the same as in the foregoing case, except that *X*, after receiving his £1,000 of interest, brings the whole of it to England. Income tax is not (semble) payable in respect of the £1,000. For, whatever *X* does with the money when he receives it, it is received by *X*, not in the United Kingdom, but in France.

7. The circumstances are the same as in illustration 6, except that the £1,000 is received by *X*'s banker for *X* at Paris, and then is remitted by the banker to *X* in England. Semble, that, logically, no income tax ought to be payable in respect of the £1,000. The receipt

¹ *Colquhoun v. Brooks*, 1889, 14 App. Cas. 493.

² *Bartholomay Brewing Co. v. Wyatt*, [1893] 2 Q. B. 499. See, however, *San Paulo Ry. Co. v. Carter*, [1896] A. C. 31.

³ *Nobel Dynamite Co. v. Wyatt*, [1893] 2 Q. B. 499.

⁴ See p. 808, *ante*.

⁵ *Conf. Colquhoun v. Brooks*, 1889, 14 App. Cas. 493.

of the banker is the receipt of *X*, and the receipt by *X*, therefore, takes place, not in the United Kingdom, but in France. Whether, however, the money may not be chargeable with income tax? The Courts very possibly may hold that the whole transaction is to be treated only as an indirect way of remitting the £1,000 to *X* in England.

8. The circumstances are the same as in illustration 7, except that *X*'s banker, after having received the £1,000, spends it by *X*'s direction in purchasing £1,000 worth of wine in Paris, and sends the wine to *X* in England. Income tax is not payable in respect of the £1,000, for no "sums" of money are received in the United Kingdom.

9. *X*, who resides in England, holds bonds, on which interest is payable by a foreign government. The interest is not payable in the United Kingdom, i. e., it is payable only to *X* or his agents in the foreign country by the government of which the bonds are issued. The interest is not liable to income tax under Schedule (C), but if remitted to *X*, or to *X*'s agent, in the United Kingdom, is liable to income tax under Schedule (D).

Our third principle does not, however, invariably hold good. A person may occasionally be compelled to pay income tax, and this under Schedule (D), though he is not resident in the United Kingdom. That this may be so, may be seen from the following illustration:—

Interest payable by a foreign company is intrusted by them to an agent in the United Kingdom for the payment thereof to shareholders in the United Kingdom. The money intrusted to the agent is chargeable with income tax in his hands.¹ The agent pays the tax due on the whole amount intrusted to him, and then pays the interest due to *A*, *B*, and *C* respectively, deducting in each case the amount of the tax.² *C* is not resident in the United Kingdom. There is, apparently, no means by which *C* can recover the amount deducted. The result is that *C* is taxed, though his case does not fall within either the first or second of our principles.³

¹ Income Tax Act, 1853, s. 10.

² Compare Income Tax Act, 1842, s. 102 (*Dowell*, p. 144), and Customs and Inland Revenue Act, 1888 (51 & 52 Vict. cap. 8), s. 24 (*Dowell*, p. 304).

³ Similar anomalies may arise with regard to incomes charged under Schedule (C).

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